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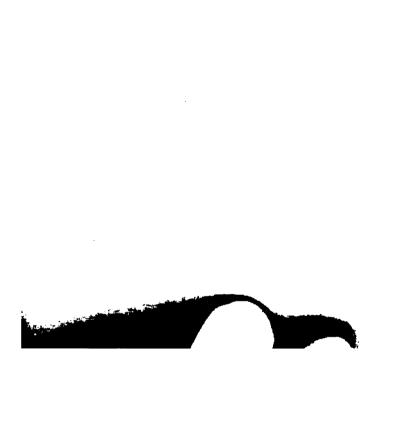


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# REAL PROPERTY

Statutes

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# ONTARIO.

WITH REMARKS AND CASES.

BY

ALEXANDER LEITH,
OF TORONTO, BARBISTER-AT-LAW.

TORONTO:

HENRY ROWSELL, 74 AND 76, KING STREET EAST.

1869.

L. Can C23 d. Real prop. 1



# PREFACE.

The Author, as Referee of Titles under the Act for Quieting Titles, and as Reader on the Law of Real Property to the Law Society, had frequent occasion to consider and annotate the various Statutes relating to that branch of the Law, and they formed the subject of many Lectures delivered by him at Osgoode Hall. He conceived the idea of publishing the result of his labors in a shape, which, he hoped, with but little further labor to himself, might perhaps be of service to the Profession. He has been compelled however to abandon the original design of treating of all the important Real Property Statutes at one time, from the difficulty in keeping pace with the Legislature, and the necessity for constant alterations of the text arising from ever recurring change in the Laws.

It has been remarked, with expression of regret, by Mr. Chancellor Kent, that frequent change of the laws is prevalent in the United States, and is, he says, characteristic of the restless disposition of his fellow citizens. The reverse is the case in England. Mr. Wood in the preface to his valuable treatise on the Registry Laws has said that whilst in England "the Statutes of Anne, and that of 8 George II. relating to Yorkshire remain yet in force, and have not even been added to or amended in any important particular, the statute book of Upper Canada has been prolific in amending, explaining, consolidating, and repealing enactments relating to that branch of the Law." Legislation here since as well as before those remarks fully justify

them. Probably the mutability of our Laws is to be ascribed rather to their being often framed with no sufficient appreciation of the existing law, or its mischief, or of the remedy requisite, than to that cause to which the learned Chancellor alludes.

Complaints on the character of legislation with us both from the Bench and the Profession have been frequent and of long continuance. The Author may therefore be excused, if occasionally, in treating of an obscure clause in a Statute which has received no light from judical decisions, he has hazarded no opinion, or done no more than call attention to difficulties, which might possibly have escaped observation.

The Chapter on Descent and part of the Chapter on Dower are taken, with many alterations, from the work of the Author on the Commentaries of Blackstone adapted to the Law of Upper Canada; a course justified by the alterations made, and the probability that that work will shortly be out of print.

The Author has to express his thanks to his friend Mr. Joseph for the preparation of the Index, and his assistance in carrying the Work through the Press.

TORONTO, April 1, 1869.

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#### ADDENDA

- PP. 4. 5, 6.—On the covenant against assignment without leave, that assignees in law are not bound though assigns are named, and that their assigns are bound, if assigns are named; see Winter v. Dumerque, 12 J. N. S. 726, Rx. Chamber.
- P. 58.—As to an instrument operating as a lease or as a mere agreement for a lease, see Davidson Convey. vol. 5, p. 6, and cases there cited.
- PP. 9, 72.—That a proviso for re-entry in a lease in case the lessee should be convicted of an offence against the game laws, does not run with the reversion, see Stevens v. Copp, L. R. 4 Ex. 20, but see per Kelly, C. B. As to covenants with a vendor of portions of lands against building thereon running with the land retained in favor of the grantees thereof, Western v. Macdermot, L. B. 1 Eq. 449. See further as to covenants not running with the land at Law, and yet being binding in Equity if notice had of the covenant; Wilson v. Hart, L. R. 1 Cha. App. 463.
- P. 191.—It is conceived that in case of death of a mortgagee, he would not, at Law at least, be so far regarded as a trustee as to prevent the application of the Statute of Victoria, and descent by primogeniture, and that in this respect Equity would follow the Law.
- P. 325.—The present practice of the Court of Chancery, under the Act for Quieting Titles, is to require that the existence of an execution in the Sheriff's hands should be negatived for a period of thirty days before the petition, from which it may be inferred that a delay to redeliver for that period would be an abandonment.
- P. 377.—That a second mortgagee, though his mortgage be on trust to sell, may purchase irredeemably on a sale by a prior mortgagee, see Kirkwood v. Thompson 13 W. R. 495, 1052, 11 Jur. N. S. 385, S. C.
- PP. 401, 402, 403.—That possession is constructive notice; Gray v. Coucher, 15 Grant, 419. That however constructive notice by possession will not prevail against a registered instrument under the Registry Act of 31 Vic., see Sherboneau v. Jeffs, 15 Grant, 574.
- P. 278.—A married woman, who was residuary legatee to her separate use under Con. Stat. ch. 73, held bound by her authority to the executors, with her husband's assent, to take land in payment of a debt due the testator; and semble even without the husband's assent; McCargar v. McKinnon, 15 Grant, 361.
- PP. 223, 224.—That a wife having joined with her husband in a mortgage, is not entitled in case of deficiency of assets on his death, to have the estate exonerated as against simple contract creditors to let in dower; White v. Bastedo, 15 Grant, 549, overruling Sheppard v. Sheppard, 14 Grant, 174; see also Thorpe v. Richards, 15 Grant, 408.
- P. 324.—That a purchaser under execution will not be affected by mere want of non-compliance with the Statute as to advertising the sale by the Sheriff &c; Connor v. Douglas, in Appeal, 15 Grant, 456, and cases there referred to.

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## 29 VIC. CH. 28.

# An Act to amend the law of Property and Trusts in Upper Canada.

[Assented to 18th September, 1865.]

This Act is taken from the Imperial Acts of 22 and 23 Vic. ch. 35, and 23 and 24 Vic. ch. 38.

#### SECTIONS 1 & 2.

- 1. Where any license to do any act, which, without such li-Restriction cense, would create a forfeiture, or give a right to re-enter, under on effect of license cona condition or power reserved in any lease heretofore granted, tained in lease, or to be hereafter granted, shall at any time after the passing of &c., Imp. Act this Act, be given to any lessee or his assigns, every such license c. 35, s. 1. shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, underlease, or other matter thereby specifically authorized to be done. but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such license); and all rights under covenants and powers of forfeiture and re-entry in the lease contained, shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specifically authorized or made dispunishable by such license, in the same manner as if no such license had been given, and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done.
- 2. Where in any lease heretofore granted or to be hereafter Restricted granted, there is or shall be a power or condition of re-entry on operation of assigning or under-letting or doing any other specified act with- Imp. act 22, out license, and a license at any time after the passing of this 23 V., c. 35, Act shall be given to one of several lessees or co-owners to assign s. 2. or underlet his share or interest, or to do any other act prohibited to be done without license, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or

underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees or owner or owners of the other shares or interests in the property, or by the lessee or owner of the rest of the property, (as the case may be), over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license.

Dumpor's It was case:—destruction of entire condition made.

on license of in a leasany breach.

It was to remedy the law as laid down in Dumpor's case (a) and the decisions thereon that these enactments were The result of that case was to establish, that when in a lease a right of re-entry was reserved to the lessoron the lessee assigning without license, and the lessorgranted a license to assign in any one particular case, such license satisfied or dispensed with the condition entirely. so that afterwards an assignment might be made without license, and no forfeiture be incurred. And this would be so, even though the license were to assign to a particular individual with an express stipulation therein that it should extend no further, and should not warrant future or other assignments. It was supposed also that, if there were other covenants besides that not to assign without leave. and the condition gave power to re-enter on breach of any one of them, the license not to observe any one covenant dispensed with the condition not only on breach of that one, but as to all. So also, if the reversioner licensed one of several lessees to assign his interest in the whole, this dispensed with the condition as to all: and as the condition cannot be divided or apportioned by act of the parties, an alienation of part of the land with the assent of the lessor determined the condition as to that part, Further, where the lessor and therefore as to all the lands. severed his reversion by conveyance, the assignees of part could not enter for breach of the condition, for by sever-

<sup>(</sup>a) 4 Coke 119; 1 Smith Lg. Ca.

ance of part of the reversion, the condition was destroyed in all (a). The principle throughout the above was that the condition as originally created was entire and indivisible, and if part of it were destroyed, the whole perished.

The Real Property Commissioners, in their third report The doctrine on the subject, say—"It has not, so far as we are aware, is not confined to conditions been decided that this doctrine applies to any other cove-against alienant or condition than that against alienation (b); but it ation. would seem to be equally applicable on principle to covenants and conditions restrictive of carrying on particular trades, or converting land from pasture to arable, and to all covenants and conditions by which the license or consent of the lessor is made requisite for doing any particular act."

No form of words contained in the license, as that it Course adoptshould only extend to that particular person or occasion, ed to revive and should not operate as a total waiver of the condition, on license. but that the same should be in force on future breach, would prevent the condition from being destroyed (c). As terms of years may be made voidable by a defeasance made at any time after their creation, the course adopted when it was desired to give the license and yet have the benefit of the condition on future breaches, was to execute a collateral deed of defeasance reviving the condition and making it applicable to future breaches. This however requires the consent of all those who were parties to the creation of the estate, or in whom the respective estates and interests of such parties are vested at the time of execution of the defeasance (d). It may be necessary still to adopt this course on license to omit to do an act, the non-performance of which would create a forfeiture, because the act does not appear to extend to such a case, as will now be ex-Plained.

<sup>(</sup>a) Sugd. Stats. 2 ed. 310. See further, the remarks post under sec. 4.

(b) See, however, this subject adverted to by Lord Eldon in Macher

The Foundling Hospital, 1 V. & B. 191.

<sup>(</sup>c) Mason v. Corder, 7 Taunt 9, per Gibbs, C. J.

Conv. by Sweet, 683.

The sectionity It is apprehended that the principle in Dumpor's case wor appies 10 🕹 apply, as well to a license not to do an act, the doing comme ti di mi which is enjoined under penalty of forfeiture, as to MEL BUT TO MENT BE MES doing an act which if done without license is a forfeit. umauut. The act extends however only to the latter (a), and th is equal necessity that it should apply to the former within Dumpor's case. There are frequently covens under which the lessee agrees to do various acts, the n performance of which gives right of re-entry, and it n be unsafe to dispense with the performance of any si covenant.

The Act does not expressly extend to executors a extend to a diministrators, though generally they are named, as v v. executors? as assigns, when intended to be included. The Act spe only of a license given to a "lessee and his assigns." would seem, however, that for the purposes and on construction of this Act at least, the word "assigns" include personal representatives as assignees in law

> If the Act does not extend to personal representati then, where they are named in, and so bound by the cor tion, a license to them to assign would operate as at ca mon law, as above mentioned, to destroy the whole righ re-entry.

Assignment by act of law works no foreiture.

As a general rule, an assignment by operation of works no forfeiture, though without license, as to perso representatives (c), and to assigns in bankruptcy (d); if the lessee became bankrupt voluntarily on his own p tion, it might be different (e): nor does an assignm by a sheriff under execution (f); but where a tenant g

<sup>(</sup>a) As to the distinction between positive and negative covenants Doe v. Marchetti, 1 B. & Ad. 715; Doe v. Stevens, 3 B. & Ad. 299.

<sup>(</sup>c) 2 Wms. Exrs. 6ed. 879. (b) Post p. 6, note a.

<sup>(</sup>d) Doe v. Bevan, 3 M. & S. 353; Wadham v. Marlowe, 2 Chitty,

<sup>(</sup>e) Hill v. Cowdery, 1 H. & N. 360; Billiter v. Young, 6 E. & F. Holland v. Cole, 1 H. & C. 67; Cole Eject. 436, 437; Wooodfall I Ten. 554, 9th ed.; and Davidson Conv. 2 ed. vol. 3, pp. 88, 89, 90.

<sup>(</sup>f) Doe Mitchinson v. Carter, 8 T. R. 300; see also Croft v. Lun 6 H. L. Ca. 672.

a warrant of attorney to a creditor for the express purpose of enabling such creditor to take the lease in execution, this was held to be in fraud of, and a breach of the covenant not to assign (a). Acquisition of the term by a man by virtue of his marital right on marriage with a female lessee, is no forfeiture (b). From all this, therefore, it appears that assignment by act of law will not work a forfeiture; such, however, may be so by use of proper language in the lease.

The question now has to be considered, how far assignees How far asin law are bound by the restraint against alienation, when signees in law and their asonce the estate has by act of law vested in them; and also signs bound. how far their assignees, or assignees in deed, are so bound.

Assignees in deed are or are not bound, according as they are or are not named in the covenant (c). Assignees in bankruptcy are not bound, and may alien without leave, though the covenant extend to assigns (d); and if the covenant does so extend, the purchaser from the assignee in bankruptcy, it seems, would be bound (c). The same observations apply where the term is sold under execution. As regards executors or administrators, if the covenant extend merely to restrain the lessee, they can assign without leave (f), but if named, they cannot (g). If the covenant extends only to restrain the "lessee and his assigns," it would seem the personal representatives are within the

<sup>(</sup>a) Doe v. Carter, supra.

<sup>(</sup>b) Anon, Moore, 21.

<sup>(</sup>c) Doe v. Smith, 5 Taunt, 795; Paul v. Nurse, 8 B. & C. 489, per Bailey J.; Bally v. Wells, 3 Wils. 33; Williams v. Earle, L. R. 3 Q. B. 739.

<sup>(</sup>d) Doe v. Bevan supra, but see the remarks in 1 Smith Lg. Ca. 6 ed. p. 44.

<sup>(</sup>e) This may be inferred from Doe v. Smith, 5 Taunt, 795; Paul v. Nune, 8 B. & C. 486, per Bailey, J.; Williams v. Erle, supra; see also Lloyd v. Crispe, 5 Taunt, 249; Weatherall v. Geering, 12 Ves. J. 511; but see the third report of Real Property Commissioners, given in 1 Davidson Conv. 3 ed. 132, 133; and see vol. 5, ed. 2, p. 178, note.

<sup>(</sup>f) Lloyd v. Crispe, 5 Taunt. 249; Anon, Moore, 21; Seers v. Hind, l Ves. Jun. 295; but see 2 Wms. Exrs. 6 ed. 880.

<sup>(</sup>g) Lloyd v. Crispe, supra; Roe d. Gregson v. Harrison, 2 T. R. 425.

word assigns, and cannot alienate without leave (a), b the point is not very clearly decided.

It has been said that it does not appear to have been expressly decided whether assigns of assignees in law arbound (b).

The condition against asassignment and assigns.

It will be seen from what has been said that the work "assigns" and the words "executors and administrators" without leave should never be omitted in the covenant or condition should always against alienation; it has been usual to omit it both before cutors admrs, and since this Act, and in this respect the act respecting short forms of leases is faulty, as it extends only to the lessee (c). The omission of the word assigns has arisen from the supposition that under the law in Dumpor's case. assigns never could be bound after license to alienate was once given to the lessee and others, thus destroying entirely, as above explained, the whole condition. No doubt this was so, but what was lost sight of was, that alienation might take place without license, by act of law, and that in such cases the parties so taking would be bound in their turn. if the condition, by use of proper words, extended to them, as has been shown before. Moreover the lessee might have underlet without license, and the reversioner have united the condition, and whatever might have been the case on an assignment (d), it would seem that the waiver of an underletting did not come within the doctrine in Dumnor's case, but the condition remained applicable to the assignee if named therein ,c'.

What is a enant not to les.

As to what will amount to breach of covenant or conbreach of cov- dition not to assign or sublet, the following cases collected assign or sub in Smith's Leading Cases, will be of service.

> When the condition was "not to assign, transfer, setover, or otherwise do and put away the indenture of de-

<sup>(</sup>a) Thornhill v. Adams, Cro. Eliz. 757, per Wa'msley, J.; Shepp. Touch, 145; 1 Pyer 6; Sir W. More's Case, Cro. Eliz. 26; Moore, 44, pl. 136; see also I Smith, Lg. Ca. p. 44, 6 ed.; Wms. Exrs. 6 ed. 879,

<sup>(</sup>b) Parideon Conv. vol. 3, 2nd ed. p. 17% note. See ante p. 5, note e, and 3rd report of Real Property Commissioners.

<sup>(</sup>c) See the observations in treating of that Act.

<sup>(</sup>d) See p. 8. note a.

<sup>(</sup>e) See p. S.

mise, or the premises thereby demised, or any part thereof," an under-lease was held no breach of it (a): so, of an equitable mortgage (b): but a condition not to "sub-let, or assign over the demised premises or any part thereof, comprehends under-leases (c): and a covenant not to "let, sell, or demise for all or any part of the term," assignments. (d) Letting lodgings was held by Lord Ellenborough not to be a breach of condition not to underlet any part of the premises without the license of the lessor (e).

The cases are said to be conflicting on the question whether a bequest of the term to another than the executor is a breach of the condition (f).

#### SECTION 3.

3. Where any actual waiver of the benefit of any covenant or Actual waiver condition in any lease, on the part of any lessor, or his heirs, exnot to extendent ecutors, administrators, or assigns, shall be proved to have taken to the particular after the passing of this Act, in any one particular instance, lar instance such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than deemed a general eral waiver.

Waiver of the benefit of any such covenant or condition, unless 24 V., c. 38. an intention to that effect shall appear.

This section pre-supposes that theretofore, if the rever- Waiver, effect soner waived a breach of covenant or condition, giving a of, restrained to the participat of re-entry, it was not merely a waiver pro hâc vice, cular matter but that the whole was gone, and that if there were a right waived. of forfeiture on breach of any one of several matters or covenants, a waiver of a breach of any one would "extend to any instance or any breach of covenant or condition other than that to which such waiver specially relates,"

<sup>(</sup>a) Crusoe v. Bugby, 3 Wils. 234.

<sup>(</sup>b) Exp. Drake. 1 M. D. & De G. 539; Doe v. Hogg, 4 D. & R. 226.

d. Holland v. Worsley 1 Camp. 20.

<sup>(</sup>d) Greenaway v. Adams, 12 Ves. 395.

<sup>(</sup>e) Doe v. Laming, 4 Camp. 73.

<sup>(</sup>f) See Cole Eject 437; see also 1 Smith Lg. Ca. 6 ed. p. 43.

so as to preclude a forfeiture on breach of any other matter or condition: it presupposes also that a waiver of a breach of a covenant or condition was "a general waiver of the benefit" of it so as to preclude the reversioner from right to forfeit on any future breach. If this were so, then a waiver and a license would not differ in their consequences: there is, however, much authority to shew that this is not so, and that the Act was framed in misconception of the law. All the text writers agree as to the law not being as the Act assumes, except as regards an assignment without leave, as to which they vary (a).

This section framed in misconception of the law.

The act applies only to actual, not to

The question whether the law is as the Act assumes it to be, is one of considerable practical importance in regard to those cases to which the Act does not relate; and as it only applies to cases of actual or express waiver, it would seem that those of implied or constructive waiver (by far the implied waiv- most common), arising out of conduct or acts inconsistent with the right to insist on a prior forfeiture, such as receipt. with notice of the right to forfeit, of after accrued due rent. are not provided for by the Act. Where the reversioner sues for or receives such rent, qua rent, with knowledge of the breach committed, this is not an actual or express waiver, as would be the case if he in writing or by parol abandoned his right to forfeit; but it is construed as a waiver of such right by implication, arising out of the fact that he has treated the lease as subsisting, and is estopped by this matter in pais from asserting the contrary, and treating the tenant as a trespasser. The language of the Imp. Act 7 Geo. IV. ch. 29, sec. 4, is much as this section, and it seems clear that in that section, the words "actual waiver" exclude implied waiver; for sec. 1 gives instances of actual

<sup>(</sup>a) Jarman Conv. by Sweet, vol. 4, p. 377, and see p. 379, where when a lessor is willing to allow an assignment pro hac vice only provided it do not extend to destroy the condition restraining it as to the future, it is recommended that he agree to waive the forfeiture. Smith Real Prop. 3 ed. 72; Cole Eject. 409; Burton 853; Platt Covenants, 428; Dumpor's case, 1 Smith Lg. Ca. 6th ed. 42; 1 Wms. Saund. 288; Davidson Conv. vol. 5, 2 ed. 179; Doe v. Pritchard 5 B. & Ad., 781, per Patterson J.; Dowell v. Dew. 1 Y. & C C. C. 366; Lloyd v. Crispe & Taunt, 257.

waiver in writing: sec. 3 alludes to actual waiver by parol and also to constructive waiver. The section of the Imp. Act from which ours is copied was taken from this Act of Geo. IV.

If the act does not apply to implied waivers, and if the law is as the act assumes it to be, then a landlord must insist on the forfeiture, under the penalty, if he receives subsequent rent, of loss of right of re-entry on any subsequent breach of the same or any other contract giving right of forfeiture.

## SECTION 4.

4. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part Apportionof the reversion shall, in respect of the apportioned rent or dition of reother reservation allotted or belonging to him, have and be enti- entry in certled to the benefit of all conditions or powers of re-entry for non-tain cases. payment of the original rent or other reservation, in like manner 23 V., c. 35, as if such conditions or powers had been reserved to him as inci-s. 3. dent to his part of the reservation (a) in respect of the apportioned rent or other reservation allotted or belonging to him.

Imp. Act 22,

This section is taken from the Imp. Act 22 & 23 Vic. c. 35, and the principle on which it proceeds is recognized in the Imp. Acts 12 & 13 Vic. c. 49, and 17 & 18 Vic. c. 32, and the Lands Clauses Act, sec. 119.

What is meant by severance of the reversion, is the case of conveyance by the reversioner of part of the lands; as on does not apa lease of two acres and a conveyance of one. The case of ply to conveya conveyance of the whole lands for part of the reversion, whole land as where a reversioner in fee should convey all the lands to for part of the one for life, is not within this act. Such a case is provided reversion. for by 32 H. VIII. c. 34, under which grantees of reversions are entitled to the same benefit of a condition as their grantors would have had, provided it relate to payment of rent, restriction from waste, or other object tending to the benefit of the reversionary estate. Con. Stat. U. C. c. 90, authorizing conveyance of rights of entry, does not apply to

<sup>(</sup>a) Thus in the Statute, should be reversion.

norm if more for condition orders, as a explained in rearing if thes Act.

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In was before explained a man in Common Law a comnies, naimse firmon s indimissible, und the course miniming the benefit of condition giving right of entry must not have preclude. inneed from right to re-enter in the whole property. to have research part of the property from the conditions or converge the reversion of part to a stranger, the comtiran a team vei un sito : itherwise a esser might E annuered a several rights of entire by several owners of several parts of the property. The consequence of tH Common Law rue was very inconvenient, and this section relieves, el far as leuer as regards remedy for trent-Mier Seerganen.

Course adopttion of a conexecuting a ferry of te-Passance.

la the re: aniv extends 0.3056 remedies is 'o Pri. 1 teed of teiensance still remaile in provenie. other cemedies.

The ment must be anportioned.

Mode of mportionment.

The mode pionted to give right of resentry on non-paed in feature, ment, of tent or non-performance of devenues, when the dition was a condition of seeming was destroyed by severance of the retire i is towardon, is by license given to commit the breach, was execution, is the time, of a collaboral deed of defendance w viving the condition as before explained ). As the Aon ample grounds preserves the benefit only of condition around "ment in their reservation," and would not extern to conditions of re-entry for breaches of covenants whe did not so reinte, as for instance to repair, it will still remisite. If the conditions are to continue in regard men breaches, that a deed of defearance should CONCESSED TO A

> The rent or other reservation must be legally apportion ed. The apportionment may be by act of law or act of the Apportionment by act of law takes place when Dilla Miles. the amount of rent has been settled by a jury in a suit be aw en the parties concerned in the rent; that by act of the parties, is on consent of all interested in the term and the reversion a.

A. Ante, pp. 2 & 3. See also Shelford Stantes 7 ed. p. 655.

b. Ante o 3 remarks on sa. I & 2.

<sup>(</sup>c) Bliss v. Collins, 5 B & Aid, \$76. See also as to apportionment notes to Clan's Case, Tudor's Lg. Cases, Rl. Prop. 2 ed. 240.

#### SECTIONS 5 & 6.

- 5. The Court of Chancery shall have power to relieve against Relief against a forfeiture for breach of a covenant or condition to insure forfeiture for breach of covenant or condition to insure forfeiture for breach of covenant or condition to insure for breach of covenant or condition to the covenant or coven against loss or damage by fire, where no loss or damage by fire enant to inhas happened, and the breach has, in the opinion of the Court, sure in certain has happened, and the breach has, in the opinion of the coats, cases.

  been committed through accident or mistake, or otherwise with Imp. Act 22, out fraud or gross negligence, and there is an insurance on foot 23 V., c. 35, at the time of the application to the Court, in conformity with 8.4. the covenant to insure, upon such terms as to the Court may Seem fit.
- 6. The Court, where relief shall be granted, shall direct a re- When relief is cord of such relief having been granted to be made by endorse-granted, the ment on the lease or otherwise.

same to be recorded. Imp. Act 22,

The Imperial Act 22 & 23 Vic. c. 35, from which these 23 V., c. 35, sections are taken, has a clause restraining power to relieve the same person more than once, or where a former waiver has taken place out of Court of a prior breach of the covenant or condition as to which relief is sought.

The Court can relieve for a breach, committed after the Retrospective passing of the act of a covenant in a lease granted before the Act (a).

In England, the power to relieve is not confined to the Court of Chancery, but may be exercised by the Common Law Courts (b).

### SECTION 7.

7. The person entitled to the benefit of a covenant on the part Lessor to of a lessee or mortgagor to insure against loss or damage by fire, have benefit shall, on loss or damage by fire happening, have the same advan- of an informal insurance. tage from any then subsisting insurance relative to the building Imp. Act 22, or other property covenanted to be insured, effected by the lessee & 23 V., c. or mortgagor in respect of his interest under the lease or in the 35, s. 7. property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant.

<sup>(</sup>a) Page v Bennett, 2 Giff. 117; 6 Jur. N. S. 419.

<sup>(</sup>b) 23 & 24 Vic. c. 126, s. 2,

Benefit of The practical benefit of this section is diminished by this section diminished by cision in Stinson v. Pennock, hereafter referred to application of that the Imperial Act. 14 Geo. 3, c. 78, s. 83, is in for 14 Geo. III. Ontario. c. 78. s. 83.

### SECTION 8.

8. Where on a bond fide purchase, after the passing of Protection of purchaser Act, of a leasehold interest under a lease containing a cov against foron the part of the lessee to insure against loss or damage b feiture under covenant for the purchaser is furnished with the written receipt of the I insurance entitled to receive the rent, or his agent, for the last payme against fire in the rent accrued due before the completion of the purchase certain cases. Imp. Act 22 & there is subsisting at the time of the completion of the purcha 23 V. c. 35, insurance in conformity with the covenant, the purchaser c s. 8. person claiming under him, shall not be subject to any lis by way of forfeiture or damage or otherwise, in respect of breach of the covenant committed at any time before the pletion of the purchase, of which the purchaser had not 1 before the completion of the purchase; but this provision to take away any remedy which the lessor or his legal repre tives may have against the lessee or his legal representativ breach of covenant.

This section would not seem to apply to morte Does not apply to mort The purchaser should preserve evidence that he was, o gages. purchase, furnished with the receipt.

#### SECTION 9.

To what leas-9. The preceding provisions shall be applicable to leases es the preceding provisions term of years absolute, or determinable on a life or liv otherwise, and also to a lease for the life of the lessee or the shall apply. Imp. Act 22 or lives of any other person or persons. & 23 V. c. 35, s. 9.

#### SECTION 10.

Release of 10. The release from a rent-charge of part of the heredita part of land charged therewith shall not extinguish the whole rent-charg charged not shall operate only to bar the right to recover any part of the to be an extinguishment of charge out of the hereditaments released, without prejudice, : the charge on theless, to the rights of all persons interested in the her the rest, &c. ments remaining unreleased, and not concurring in or confi Imp. Act 22 & 23 V. c. the releases. 35, s. 10.

<sup>(</sup>a) 14 Grant, 604. See chapter on Mortgages, post.

This section is taken from the Imp. Act 22 & 23 Vic. c. 35

If the owner of the rent released part of the land from A release. the charge, the whole rent was discharged, for the charge is purchase, or taking by entire, and issues out of and is charged on every part of the devise of part land, and is also against common right (a). So also, if the of the land owner of the rent purchased, or took by devise (b), part of leased the the lands charged, the whole charge was released by whole rent; but no release operation of law; and it would seem, as hereafter explained, took place that the act will not prevent a release when it takes place when the land by operation of law. But if part of the lands be acquired quired by act by descent, or by title paramount (c), no release would take of the party, place under the old law; and the owner of the rent could lease of part always release part of it to an owner of the land.

It may well be contended that the Act does not apply to Does the act prevent a release where it takes place by operation of law, apply to a reas on purchase or taking by devise of part of the lands ation of law, The expression, that the release "shall operate only to bar as on purthe right to recover any part of the rent-charge out of the of the land? hereditaments released." implies the existence of some one owning the part released, other than the releasor, against whom the releasor was to be barred of right to recover; such expression would not be applicable where the lands released became the property of the owner of the charge. who cannot be supposed to have required legislation to bar his right to recover out of his own lands. Moreover, the act contemplates a concurrence in, or confirmation of the release, and it may be said this would not apply when the release is the mere result, by operation of law, of acquiring the lands, and is not a release in deed.

Before the Act, if there were several owners of the land, Right of conand the owner of the rent charge enforced payment of all tribution of from one of such owners, the latter had his remedy in veral owners equity for contribution against the other owners; it would paying the

whole charge.

 $L_{8}^{(a)}$  Co. Litt. 148; see also generally, notes to Cluns case, Tud. Lg. Ca. 2ed, 240; 2 Jar. & By. Conv. by Sweet, 60.

<sup>(</sup>b) Dennett v. Pass, 1 B. N. C. 388.

<sup>(</sup>c) Co. Litt. 148 b.

seem he had no remedy at law (a). The right for a bution of the owners of so much of the lands as m unreleased is preserved by the Act, on any of the being exempted by a release from payment.

Difficulty of enforcing contribution.

There must necessarily be sometimes great difficul the attempt of one of several owners of the land, wh paid all the rent, to enforce his personal remedy again other owners. Such a remedy arises by reason of m of estate, and in case the land charged with the ren passed into the hands of various persons, through se chains of title, it may be almost impossible to prove ownership which alone creates the liability. also, as the rent would have to be apportioned as t several owners according to value, and as in equit various portions of the land are as sureties for each that all the co-owners must be parties to the suit. ' difficulties are not the result of the Act. for they ex before; they arise necessarily where there is one charge paid by one of several owners of the land char

Sometimes on sale of lands subject to an entire charge to different persons, the rent is apportioned or several parcels, and the purchasers take and give cross ers of entry and distress for the apportioned rent (b).

### SECTION 11.

Mode of exe-

11. A deed hereafter executed in the presence of, and at cuting powers by two or more witnesses in the manner in which deeds are narily executed and attested, shall, so far as respects the tion and attestation thereof, be a valid execution of a pov appointment by deed or by any instrument in writing, not mentary, notwithstanding it shall have been especially re-Proviso: not that a deed or instrument in writing, made in exercise or power, should be executed or attested with some addition other form of execution or attestation or solemnity; Pre always, that this provision shall not operate to defeat any tion in the instrument creating the power, that the cons

to defeat certain directions. Imp. Act 22 & 23 V., c. 35, s. 12.

<sup>(</sup>a) Hunter v. Hunt, 1 C. B. 800. (b) See 1 Davidson Conv. 2 ed.

any particular person shall be necessary to a valid execution. or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument; and nothing herein contained shall prevent the donor (a) of a power from executing it conformably to the power, by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend.

The Imperial Acts on this subject are those of 22 & 23 Vic. ch. 35, sec. 12, and 54 Geo. III, ch. 168.

As powers require to be strictly executed, especially Defective exwhen not coupled with an interest, it had been held that ecution of n the common case of a power given to be exercised under and and seal and attested by witnesses, that the exercise of the power was invalid if the witnesses did not attest he fact of signing as well as of scaling, and consequently hat a deed executed with the attestation in the form isually followed (in England at least), viz., "sealed and lelivered in presence of," would not suffice (b), nor would attestation clause thus, "witness A. B."

It would seem that the Act will not extend to consent Act does not o execution of a power, which is frequently enjoined, and extend to con-Equired also to be given under certain formalities.

senis to execution of a

The defective execution of a power may often be reme-power. lied and aided in equity (c) in favor of a purchaser from Defective experson exercising the power, or of a creditor, wife or ecution aided by equity. child, or charitable purpose.

The word "donor" in this section is a misprint for Word donor' " donce." a misprint.

## SECTION 12.

12. Where, under a power of sale, a bond fide sale shall be Sale under made of an estate, with the timber thereon, or any other articles power not to be avoided by

<sup>(</sup>a) Donee? (b) Wright v. Wakeford, 4 Taunt. 213; but see Vincent v. Bishop of Sodor and Man, 5 Ex. 683, 693; Burdett v. Spilsbury, 10 C. & F. 340; see further, Sugden on Powers.

T. See Sugden on Powers, and notes to Tollet v. Tollet, 1 W. &

taken payment to tenant for life. Imp. Act 22 & 23 V., c. 35, s. 13.

reason of mis- attached thereto, and the tenant for life, or any other party to the transaction, shall by mistake, be allowed to receive for his own benefit a portion of the purchase money or value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said principal moneys and interest under the direction of the Court, upon such parties as in the opinion of the Court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly, the Court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application, as between solicitor and client, shall be paid by the purchaser or the claimant under him.

> In a case where a man was tenant for life, without impeachment for waste, of a settled estate, with a power of sale in trustees, to which his consent was necessary, the estate with the standing timber was sold, and the trustees received the value set upon the estate, and the tenant for life received the value of the timber, all parties supposing that as he might have cut and sold the timber, he was entitled to the value of it although standing; yet the sale was set aside, and the decree was affirmed in the House of The mistake having been discovered, the tenant for life, before the litigation, invested the like amount in the funds in the names of the trustees upon the trusts of the settlement, but this circumstance was held not to vary the case.

## SECTIONS 13, 14, 15, 16, & 17.

Devisee in trust may raise money by sale, notwithstanding

13. Where, by any will which shall come into operation after the passing of this Act, the testator shall have charged his real estate or any specific portion thereof, with the payment of his debts, or with the payment of any legacy or other specific sum

<sup>(</sup>a) Cockerell v. Cholmeley, 1 Russ. and Myl. 418; 1 Cl. and F. 60.

of money, and shall have devised the estate so charged to any want of extrustee or trustees for the whole of his estate or interest therein, press power and shall not have made any express provision for the raising of Imp. Act 22 such debt, legacy, or sum of money out of such estate, it shall be & 23 V. c. lawful for the said devisee or devisees in trust, notwithstanding 35, s. 14. any trusts actually declared by the testator, to raise such debt. legacy or money as aforesaid by a sale and absolute disposition. by public auction or private contract, of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortrage so executed, may reserve such rate of interest, and fix such period or periods of repayment as the person or persons executing the same shall think proper.

14. The powers conferred by the last section shall extend to all Powers given and every person or persons in whom the estate devised shall for by last section the time being be vested by survivorship, descent or devise, or to survivors, deany person or persons who may be appointed under any power visees, &c. in the will, or by the Court of Chancery, to succeed to the trus- Imp. Act 22 teeship vested in such devisee or devisees in trust as afore- 35.8. 15. mid.

15. If any testator who shall have created such a charge as is Executors to described in the thirteenth section, shall not have devised the have power of bereditaments charged as aforesaid, in such terms as that his raising money, whole estate and interest therein shall become vested in any trus- there is no tee or trustees, the executor or executors for the time being, sufficient named in the will, if any, shall have the same or the like power Imp. Act 22 of mising the said moneys as hereinbefore vested in the devisee & 23 V.c. or devisees in trust of the said hereditaments, and such power 35, s. 16. shall from time to time devolve to and become vested in the pernon or persons (if any) in whom the executorship shall, for the time being, be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate.

16. Purchasers or mortgagees shall not be bound to inquire Purchasers. whether the powers conferred by sections thirteen, fourteen and &c., not bound fifteen of this act, or either of them, shall have been duly and to powers. correctly exercised by the person or persons acting in virtue Imp. Act 22 & 23 V. c. thereof.

35, s. 17.

17. The provisions contained in sections thirteen, for Secs. 13, 14 and 15 not to fifteen and sixteen, shall not in any way prejudice or af affect certain sale or mortgage already made or hereafter to be made, a sales, &c., nor to extend to in pursuance of any will coming into operation before the devisees in fee of this act, but the validity of any such sale or mortgage or in tail. ascertained and determined in all respects as if this Act Imp. Act 22 & 23 V. c. passed: and the said several sections shall not extend to 35, s. 18. to any person or persons in fee or in tail, or for the t whole estate and interest charged with debts or legaci shall they affect the power of any such devisee or devisee or mortgage as he or they may by law now do.

> The law on the subject matter of these sections found treated of at some length in the works of text writers (a).

### SECTION 18.

In case of limitation to uses they shall they arise, withoutcontisons originally seized. Imp. Act 23 & 24 V. c.

38, s. 7.

18. Where by any instrument any hereditaments have or shall be limited to uses, all uses thereunder, whether ex take effect as or implied by law, and whether immediate or future, or gent or executory, or to be declared under any power ther nued seizin or tained, shall take effect when and as they arise by force of scintilla ju- relation to the estate and seizin originally vested in the ris in the per-seized to the uses, and the continued existence in elsewhere of any seizin to uses or scintilla juris, shall deemed necessary for the support of, or to give effect to or contingent or executory uses; nor shall any such seizir or scintilla juris be deemed to be suspended, or to rema subsist in him or elsewhere.

Scintilla juris Much discussion has arisen in determining who abolished. seisin is upon which the statute operates in the springing or contingent uses, during their suspens when they come into existence; as, for instance estate were conveyed to feoffees and their heirs to of A for life, remainder to the use of his first and

sons (then unborn) in tail, remainder to the use of B The difficulty arose in this way; as it was necessal

<sup>(</sup>a) Sug. V. & P. 662, 14th ed.; Sug. Powers, 120-122, 2 Davidson Conv. 2 ed. 254, 832-840; 2 Jur. N. S. 68; Shelfo 494, 7th ed.

there should be a person seised to the use of the person to whom the use was limited, where and how was a seisin to be found in the feoffees to serve the contingent remainders to the first and other sons when they came into existence? Some contended that the legal estate or use continued in the trustees in remainder expectant on the estate of freehold: others, that though the ultimate remainder was in fee, and was executed in B, yet there remained in the feoffees, unexecuted by the statute, a possibility of seisin, or as it was termed, a scintilla juris et tituli, to serve the contingent uses as they became vested. A third party contended that the seisin was at once impressed upon all the uses, so that in the case put. B would take a qualified though vested estate, subject to be divested upon the birth of a son of A. These questions were of no great practical importance, and are now at rest (a).

19. Any person shall have power to assign personal property, Assignment now by law assignable, including chattels real, directly to himself to self and and another person, or other persons or corporation, by the Imp Act 22 like means as he might assign the same to another. & 23 V. c. 35. s. 21.

This section will be of assistance in the case of trust Personal proestates, where it is desired to appoint a new trustee to hold perty may be iointly with a continuing trustee. If real or personal pro- one person Perty were held by A, or by A and B jointly as trustees, directly to himself and and it were desired to appoint C as co-trustee with A in another, the one case, or in the stead of B, who retires, in the other case, two instruments, and the intervention of some third Person, were requisite to vest the personalty in A and C. As regards the freehold real estate, one instrument only is requisite, for A can convey by some common law conveyance or statutory grant to C, to the use of A and C jointly,

<sup>(</sup>a) It is to be hoped that the action of the Legislature was not fore-hadowed to Popham, C. J., by the argument before him, and that the learned Judge was endowed with no mystical lore, when he predicted that not to cherish the scintilla juris would be to cast the whole commonwealth into a sea of troubles, and endanger it with utter con-fusion and drowning."

and the Statute of Uses would vest the legal estate in them; but, inasmuch as the statute can, as hereafter explained (a), only execute a use when a person is seised to the use, it is entirely inoperative as regards personal ty. The consequence was, that before this Act, where the transt estate consisted of freehold and personalty, including leaseholds, the old trustee or trustees conveyed the freehold to the continuing and the new trustee as joint tenants, one conveyance as before mentioned, but assigned the personalty by another instrument to some third person on trust to re-assign to the continuing and new trustee as joint tenants, who re-assigned accordingly.

The act remedies inconvenience only as regards personalty by law assignable; so far as regards choses in action not by law assignable, but of which an assignment is recognized in equity (b), as for instance a mortgage debt, the ey were nevertheless assigned before the act in ordinary partice, in like manner as personalty assignable at law, coupled however with a power of attorney to sue in the name of the transferors (c). Such a practice does not seem to be necessary, and a simpler form might be adopted (d), for, as observed by Mr. Lewin, equitable interests shift according to intention, and therefore no legislative interference

It has been said, that as the Act does not say the assignable shall take as joint tenants, which tenancy is always advisable in the case of trustees' that its logal operation in the at respect has been questioned. Con Stat. c. 82 s. 10, would not apply to cause the trustees to take as joint tenants as it does not relate to personally, unless "money to be laid out in the purchase of land and chattels or other research proporty transmissible to beits. See sec. 14 of that act.

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## SECTION 20.

20. Any seller or mortgagor of land, or of any chattels, real or Punishment personal, or choses in action, conveyed or assigned to a purchaser of vendor or r mortgagee, or the solicitor or agent of any such seller or mort- mortgagor for fraudulent agor, who shall, after the passing of this Act, conceal any settle-concealment zent, deed, will or other instrument material to the title, or any of deeds, &c., acumbrance, from the purchaser or mortgagee, or falsify any pedigree. edigree upon which the title does or may depend, in order to Imp. Act 22 aduce him to accept the title offered or produced to him, with & 23 V.c. 35, s. 25, and tent in any of such cases to defraud, shall be guilty of a misde- 23 & 24 V. leanor, or being found guilty, shall be liable, at the discretion c. 38, s. 8. f the court, to suffer such punishment, by fine or by impri->mment for any time not exceeding two years, with or ithout hard labour, or by both, as the court shall award, and all also be liable to an action for damages at the suit of the Tchaser or mortgagee, or those claiming under the purchaser or LOrtgagee, for any loss sustained by them or either or any of nem, in consequence of the settlement, deed, will or other intrument or incumbrance so concealed, or of any claim made by ny person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such da-Dages where the estate shall be recovered from such purchaser or nortgagee, or from those claiming under the purchaser or mort-52 gee, regard shall be had to any expenditure by them, or either or any of them, in improvements on the land; but no prosecution for any offence included in this section, against any seller or Crown Law mortgagor, or any solicitor or agent, shall be commenced with-Officer to proout the sanction of Her Majesty's Attorney-General for Upper secution Canada, or in case that office be vacant, of Her Majesty's Solicitor-General for Upper Canada; and no such sanction shall be given without such previous notice of the application for leave to prosecute, to the person intended to be prosecuted, as the Attorney-General or the Solicitor-General (as the case may be) shall direct: and no prosecution for concealment shall be sustained unless a written demand of an abstract of title was served by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage.

Independently of this section, the party aggrieved under The law and he circumstances therein named has a remedy, though not remedy apart pression of defects, or misrepresentation.

from the act, to the extent given by this act. It is said (a) "moral writ in case of supers insist that a vendor is bound, in foro conscientia, to acquaint the purchaser with the defects in the subject of the contract. Our law does not entirely coincide with this strict precept of morality. If at the time of the contract the vendor himself was not aware of any defect in the estate it seems the purchaser must take the estate with all its faults, and cannot claim any compensation for them. And even if the purchaser were ignorant of the defects and the vendor was acquainted with them, and did not disclose them, yet if they were patent, and could have been discovered by a vigilant man, no relief will be granted against the vendor: and equity follows the law. But if a vendor during the treaty industriously prevent the purchaser from seeing a defect which otherwise might easily have been discovered, he is not entitled to the aid of a court of equity and it is conceived he could not sustain an action against the purchaser for breach of the contract." (b) "The vendor is bound to deliver to the purchaser the instruments by which incumbrances were created, or on which defect arise, or to acquaint him with the facts, if they do no appear on the title deeds, and the same rule extends to the attorney of a vendor who knows of incumbrances. the exception of a vendor, or his agent, suppressing a incumbrance, or a defect in the title, a purchaser canno obtain relief against the vendor for any incumbrance defect in the title to which his covenants do not extend and therefore, if a purchaser neglect to have the title inve tigated, or his counsel overlook any defect in it, he may without a remedy" (c). Even after the contract is execute and conveyance and payment made, the purchaser can, i case of fraud, obtain relief and have the transaction recinded in equity (d). The solicitor for the vendor, as we as the vendor, is liable at common law, who by misrepre sentation induces a person to buy (e).

<sup>(</sup>a) Sug. Vend. p. 1.

<sup>(</sup>b) See also Dart Vend. 3 ed. 57; Ferrier v. Peacock, 2 F. & F. 71

<sup>(</sup>c) Sug. Ven. 14 ed. pp. 5, 6. (d) Dart Ven. 3 ed. 520. (e) Id. p. 6

It would seem to be clear that the action at Common The statutory Law for fraud or misrepresentation would only lie in favor action runs with the land. of the party imposed on, and his personal representatives. and would not run with the land, but the statutory right of action for damages is made, apparently, to run with the and and placed on much the same footing as a covenant for title

It will be observed the Act limits no time within which No time fixed an action must be brought, and as it is a new and statu-within which action must tory right, it may be questioned whether the time fixed be brought. within which personal actions theretofore recognized must be brought, would be a bar to an action under this

The Act extends to the concealment of a document, The act exthough not in the custody or power of the vendor, for it tends to concealing docuexpressly extends to an incumbrance, which cannot be ments not in supposed to be in the charge of the vendor.

The sanction of the Attorney-General is not requisite as No demand of to civil actions, nor is it necessary for such that an abstract abstract reshould have been demanded in writing. This sanction and quisite as to a demand are essential to a prosecution for concealment; but or prosecuthe latter is not required as to prosecution for falsifying a tion for falsipedigree. As a check on a vendor and his solicitor, and gree. with a view to evidence against them in case of possible Important concealment, it will always be advisable to demand and in- always to resist on an abstract, independently of such being the proper abstract. (though perhaps in this country not universal) course of practice.

Where both the vendor and his solicitor being liable for If vendor damages for concealment or falsification, the same have and solicitor both liable, been recovered wholly from the solicitor, it may be ques- and full comtionable whether he would have any remedy over against pensation be his client, though the latter may have derived the whole latter, can he benefit resulting from the funds, and the damages were recover from only in proportion to the benefit. In such case the maxims might nevertheless still apply,—" ex dolo malo non oritur actio," and "in pari delicto potior est conditio defendentis."

à.

vendor's cus-

Can a vendor a defect, when absence of notice of it would not can he now sell under special condititle, and not tract of sale. tions as to disclose the

defect?

In some repects the Act would seem to interfere with now suppress the former law and practice; first, in those cases wherein a defect in title is concealed, knowledge of which would prevent the title being good in the hands of a purchase prejudice the for value, and who without notice would take a good tit 1 purchaser; or as a purchaser for value; secondly, in those cases where vendors have been permitted to sell a title, defective their knowledge, by the frame of their conditions or come -

As regards the first case, there are many occasions where in a vendor may conscientiously and fairly suppress wh is, in fact, a defect in the title, but is not such as regards purchaser for value without notice. Take the case of unregistered mortgage in fee, which has, in fact, been tisfied, but the proof of which is wanting, and the appear ent owners of the charge or mortgage have been silent vears, though not barred by time; here, if the purchase pays his purchase money, and takes his conveyance witho notice and acquires priority of registration, he will not affected by the mortgage. Still, a vendor, and much mor his solicitor, may well hesitate how far they can wit safety suppress the mortgage: how far in this or any other case they can be sure the law and the facts will surely so apply as to protect the purchaser, for on his safety depends theirs. Have they foreseen that by possibility the mortgage might be registered between the delivery of the conveyance and its registry, or that if the conveyance were registered defectively, it would acquire no priority over the mortgage? Are they prepared to assume the responsibility of deciding for themselves the difficult law of notice and priorities? It is apprehended that the effect of the Act will be, that defects and incumbrances will, and probably must, be disclosed, which if unknown to the purchaser, would not prejudice him, but being disclosed prevent a sale (a).

The second case above alluded to is that of sale by a title defective to his knowledge, and where, at least, the

<sup>(</sup>a) Drummond v. Tracy, 1 John. 608.

vendor has not himself caused the incumbrance or defect. The law has hitherto permitted sale of such a title, by allowing the vendor in his contract or conditions of sale to stipulate against production of documents, or that the vendor shall not make any objections to the title anterior to a certain date (a). The Act leaves it uncertain whether this can still be done, or rather whether notwithstanding any such conditions of sale, the vendor, under peril of the penalties in the Act, would not have to disclose the defect. Probably the vendor need not disclose the defect

### SECTION 21.

21. In the construction of the previous provisions in this Act, Interpretathe term "land" shall be taken to include all tenements and used in this hereditaments, and any part or share of or estate or interest in Act.

any tenements or hereditaments, of what tenure or kind soever; "Lands." and

The term "mortgage" shall be taken to include every ins-"Mortgage." trument by virtue whereof land is in any manner conveyed, assigned, pledged or charged as security for the repayment of money or money's worth lent, and to be re-conveyed, re-assigned or re-leased on satisfaction of the debt; and

The term "mortgagor" shall be taken to include every person "Mortgagor" by whom any such conveyance, assignment, pledge or charge as aforesaid shall be made: and

The term "mortgagee" shall be taken to include every person "Mortgagee" to whom or in whose favor any such conveyance, assignment, Imp Act 22 & 28 V. c. pledge or charge as aforesaid is made or transferred. 35, s. 25.

### SECTION 22.

22. A power of attorney executed by a married woman for the Powers of Attale or conveyance of any real estate of or to which she is seized torney executed in Upper Canada, or authorizing the attorney to executed by married women.

In the same of the same of

<sup>(</sup>a) Davidson Conv. vol. 1, 3 ed. p. 538, title, conditions of sale.

respecting Dower, and An Act respecting the conveyant Estate by Married Women; and provided (2) that he is a party to and executes such power of attorney or th other instrument executed in pursuance thereof, where is for the sale or conveyance of her real estate.

Section 22 is treated of in considering Con. St. 85, as to conveyances by married women.

### SECTIONS 23 & 24.

As to a power of attorney provided expressly to be decease of constituent.

23. In case a power of attorney for the sale or mana real or personal estate, or for any other purpose, pro the same may be exercised in the name and on the beh executed after heirs or devisees, executors or administrators of th executing the same, or provides by any form of words same shall not be revoked by the death of the person the same, such provision shall be valid and effectual to and purposes both at law and in equity, according to and effect thereof, and subject to such conditions and re if any, as may be therein contained.

As to things done and powers of attorney after the decease. &c., of constituents, withcial provisions.

24. Independently of any such special provision in of attorney, every payment made and every act done in pursuance of any power of attorney, or any power in writing or verbal, and whether expressly or implie or an agency expressly or impliedly created after the out such spe- the person who gave such power or created such agenc he has done some act to avoid the power or agency, withstanding such death or act last aforesaid, be valid a every person party to such payment or act, to whom the death, or of the doing of such act as last aforesai known at the time of such payment or act bond fid aforesaid, and as respects all claiming under such last: person.

The Imperial Act 22 & 23 Vic. c. 35, s. 26, The Imp. Act means so extensive as this section, and extende trustees, executors and administrators.

A power was revoked at law by the

A power of attorney was, at law at least, rev death of the donor thereof, though acted on bond;

out knowledge of the death (a); but this rule has not pre-death of the vailed in all cases in Equity, especially where a valuable donor, but in equity, in cerconsideration has passed; and, as against persons claiming tain cases acts under the donor of the power, acts bond fide done, have bona fidedone been held upheld after death of the donor (b).

were upheld.

The Act would not protect in cases where the donor of The Act does of the power himself had but an interest determinable by not protect his death, as in the case of a tenant for life.

where the interest of the donor determined by his death.

# SECTION 25.

25. Where an executor or administrator, liable as such to the As to liability rents, covenants or agreements contained in any lease or agree- of executor or ment for a lease granted or assigned to the testator or intestate administrator whose estate is being administered, shall have satisfied all such lia- rents, covebilities under the said lease, or agreement for a lease, as may have nants, &c. accrued due and been claimed up to the time of the assignment Imp. Act 22 bereinafter mentioned, and shall have set apart a sufficient fund and 23 V. c. to answer any future claim that may be made in respect of any 35, s. 27. fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laving out the same may not have arrived, and shall have assigned the lease, or agreement for a lease, to a Purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased, to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be) of the personal estate of the deceased, to meet any future liability under the said lease, or agreement for a lease; and the executor or administrator so distributing the residuary estate, shall not, after having assigned the said lease, or agreement for a lease, and having where necesmry, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease, or agreement for a lease; but nothing herein contained shall pre-Judice the right of the lessor, or those claiming under him, to follow the assets of the deceased into the hands of the person or

in respect of

<sup>(</sup>a) Co. Litt 52 b; per Lord Ellenborough, 4 Camp. 272; Houstoun v. Robertson, 6 Taun. 448; see also, Re Jones 3 Drew. 679.

<sup>(</sup>b) Campbell v. Anderson, 4 Bligh, N. R. 513; Exparte MacDonnell, Buck 399; Bailey v. Collett, 18 Bea. 179; see also Kiddill v. Farnell, 3 & & G. 434.

persons to or amongst whom the said assets may have been distributed.

The former ities,

In Williams on Executors (a), referring to the liability law as to contingent liabil. of an executor, before the Act, as to contingent claims and the question whether he could safely pay legacies, or deliver over a residue where there was an outstanding covenant of his testator, or bond with a condition, or the like. which had not been, but might be broken, it is said, "it would seem when such liabilities exist, an executor is not bound to part with the assets either to a particular or residuary legatee without a sufficient indemnity: and that a Court of Equity will not compel him to do so without such indemnity, or without impounding a sufficient part of the residuary estate for that purpose; for otherwise, if the contingent covenants. &c., should afterwards be broken. the executor would be liable, according to the above decision (b), to answer the damages de bonis propriis, without any fault in him."

and payment of legacies before debts notice.

"Authorities appear to demonstrate that the mere circumstance of want of notice of a debt or claim against the of which exe- estate of the deceased, will not excuse an executor from cutor has no the payment or satisfaction of it, if the assets were originally sufficient for the purpose, notwithstanding that in igorance of it, he has bond fide handed over the assets to legatees or parties entitled to distribution. But it seem∈ to have been considered in some cases, that lapse of time may operate as a waiver of the right of the creditor om claimant, by way of laches on his part, so as to preclude him from complaining of the insufficiency of the assets (c)."

Protection under ss. 27, 31.

If, however, the executor or administrator proceed in compliance with sec. 27, he will be entitled to the same protection as if he had administered under decree of the Court (d); and in many cases he might find it advisable task advice of the Court, under sec. 31. If compelled to pa-

<sup>(</sup>a) 6 ed. 1246. (b) Pearson v. Archdeaken, l Al. & Nap. 23.

<sup>(</sup>c) Wms. Exrs. 6 ed. 1254, (d) Clegg v. Rowland, L. R. 3 Eq. 36

a claim of which he had no notice, after having distributed, Executor can he has a remedy over against the legatees to refund; and tee to refund, the creditor himself may follow the assets in the hands of and the crethe legatees without proceeding against the personal rep-lowthe assets. resentative (a).

This section is retrospective in its operation (b).

This section

The Act extends apparently only to the case of the personal retrospective, representative himself having assigned the lease to a pur- Cases to chaser (c), and thus it would not take in the case where which it does not extend. the testator or intestate being lessee, and having covenanted. had himself assigned the lease; nor the case wherein the lessee's interest should have been specifically bequeathed, and have become vested in the legatee on the assent of the executor: nor where it has been transferred on distribution of the estate.

Where the testator or intestate is not lessee, but assignee Where testaof the lease, there is no necessity for applying the provi-tor is an sions of the Act, as in such case, not being liable on any necessity for privity of contract, but merely by privity of estate, and so applying this liable only for breaches of covenants running with the land during the continuance of privity of estate, the executor or administrator is relieved from future responsibility simply by assigning the estate. This, of course, would not suffice where the testator or intestate is lessee; and has covenanted, for though on assignment the privity of estate would be discharged, yet the privity of contract would remain, and the covenant could be sued upon, even though the lessee should have accepted the assignee as his tenant

(d). Where, however, the testator or intestate, having been if the testator an assignee of the lessee, has assigned the lease, and so has on becoming become relieved from liability for future breaches of cove-covenanted to ment, it may yet be that the personal representative would indemnify be liable for such breaches, if the testator had, (as is not and has after-

assignee have wards assign-

<sup>(</sup>e) 2 Wms. Exrs. 1344. See post remarks under s. 27.

<sup>(</sup>b) In re Green, 2 De Gex, F. & J., 121; Smith v. Smith, 1 Dr. & Sm 384; Dodson v. Sammell, 1 Dr. & Sm. 575; 9 W. R. 887.

<sup>(</sup>c) Dodson v. Sammell, 9 W. B. 887.

<sup>(</sup>d) See notes to Spencer's case, 1 Smith, Lg. Ca.; Montgomery v. Spence. 23 Q. B. U. C. 89.

Act apply quoad that covenant?

of testator,

ed, will this unusual), on the assignment covenanted with the lessee to indemnify him; on such a liability it is not clear that this section would apply.

If the personal representative comply with the Act, and

assign the lease to a purchaser, and, where there may be future claims for fixed sums to be laid out on the land, set apart a fund to meet them, he may distribute without re-If after come gard to future claims not fixed or unascertained under the the act, and lease, and without being personally liable for such claims. distribution. If, however, after distribution, there should be a breach of there should be a breach any of the testator's or intestate's covenants in the lease. of a covenant not provided for by the fund as not being of a fixed or asand further certained character, as, for instance, a covenant to renair. assets come and the representative should have notice of such breach. in, the claim on the cover it would seem he could not distribute further assets which nant must: be may have come to his hands since the first distribution had regarded be before breach, without regard to the claim under such distribution. hreach

#### SECTION 26.

As to liability conveyances on rent charge

Imp. Act 22 &r 2່3 V. c. 35, s. 28.

26. In like manner where an executor or administrator, liable or executor as such, to the rent, covenants or agreements contained in any in respect of rents, &c., in conveyance on chief rent or rent-charge, (whether any such rent be by limitation of use, grant or reservation.) or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate, whose estate is being administered, shall have satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased, to meet any

future liability under the said conveyance, or agreement for a conveyance; and the executor or administrator so distributing the residuary estate, shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

Some of the observations made above as to section 25 apply to this section.

A rent charge, created by limitation of use in favor of, Rent charge, or in a grant to, or by way of reservation in a conveyance how created. by, the testator or intestate, is spoken of in this section.

Since the Stat. quia emptores a man can no longer make Assignment over his whole estate leaving in himself no reversion, and with reservareserve thereon a rent to himself qua rent service, for which. as in the ordinary case of landlord and tenant, distress may be had as of common right. That Statute abolishing subinfeudation and causing the assignce to hold of the superior lord, prevented any tenure between the assignor and assignee, and thus there can be no rent service. If rent be reserved on such an assignment it will operate as a grant by the assignee, of a rent charge, which, if no power of distress thereupon be granted, will be a rent seck, and may be distrained for if brought within s. 5 of 4 Geo. 2, c. 28.

A rent charge may also be created by limitation of use, Rent charge as on a grant to A and his heirs to the use that the grantor by limitation and his heirs may have thereout yearly a certain rent, to of use. which are sometimes added further uses, as to re-enter and hold till payment after default, and, subject to such use, to the use of A and his heirs. Here the St. of Uses (ss. 5, 5) operates, and the person in whose favor the use is declared, has, by the statute, seisin and possession of the rent, with power to distrain (a).

(a) See the language of the Act, post p. 56.

It is not uncommon in some parts of England t building land in fee, in consideration of a perpet charge reserved or limited by way of use to the pa veying, with a covenant for payment.

Difficulty in applying this section.

This section can have little application in this even in England it is difficult to see how it can a those cases above referred to, of conveyances in fe the Act was chiefly intended to meet. The person sentative as such has no power to convey a freehold and therefore cannot place himself in a position t the benefit of the Act. which requires a conveyance Possibly an executor might, under the will, hav given him to sell, but an administrator never ca freehold

## SECTION 27.

As to distriassets of testatice given by executor or Imp. Act 22 & 23 V. c. 35, s. 29.

27. Where an executor or administrator shall have gi bution of the or the like notices, as in the opinion of the Court in w tor or intest executor or administrator is sought to be charged, we ate after no- been given by the Court of Chancery in an administrat for creditors and others to send in to the executor or ad administrator, tor their claims against the estate of the testator or intes executor or administrator shall, at the expiration of named in the said notices, or the last of the said no sending in such claims, be at liberty to distribute the the testator or intestate, or any part thereof, amongst tl entitled thereto, having regard to the claims of which cutor or administrator has then notice, and shall not for the assets, or any part thereof, so distributed to any whose claim such executor or administrator shall not notice of (a) the time of distribution of the said assets, thereof, as the case may be; but nothing in the pre contained shall prejudice the right of any creditor or to follow the assets, or any part thereof, into the hand person or persons who may have received the same respe

Contingent St. 13 & 14 Vic. c. 35.

The Imperial Act of 13 & 14 Vic. c. 35, ss. 19 et comms provided for by Imp. provisions bearing on the subject matter of this sect provides especially as to a fund to be set apart for

gent claims (a). The position of the executor as regards corntingent claims of which he had notice, was before referred to in treating of section 25.

It would seem that it is not absolutely necessary for a Executor havcreditor to send in his claim, if the executor or administra-ing notice of tox have notice of it.

a debt. &c. not sent in

If after distribution, further assets should come to the If after distrihands of the executor, they will be liable to a creditor who bution further assets come was v have sent in his claim after the distribution, or of in, liable to whose claim the executor has since then had notice.

subsequent claims.

Where part of the assets are paid or handed over to next of kin or legatees, and part retained by the executor on Claims of credistribution, as being the share or legacies of others entitled, in when some and the executor has so acted that the payments made, or of next of kin assets handed over have been properly made or handed satisfied and over, the right of a creditor subsequently claiming as to the shares or legpart retained is subject to some difficulty. Where payretained. ments have been made or assets distributed, by direction of When distrithe Court, and part retained in Court to answer the share bution made of infants, or legatees, it has been held that a creditor coming of the court; in after the distribution can claim of the amount retained only such proportion as it bears to the whole amount available for distribution (b).

Where, however, the partial distribution had not been when not had by direction of the Court, it would seem that before the under decree, Act a creditor, guilty of no laches, could insist on payment of his claim to the full extent of the amount retained (c); and the next of kin or legatees thus prejudiced, or deprived of their shares or legacies, would be left to their remedy over for contribution against the other legatees or next of

(c) March v. Russell, 3 M. & Cr. 31; Davies v. Nicholson, 2 De G. & Jones, 693.

<sup>(</sup>a) See King v. Malcott, 9 Hare, 692; Brett v. Carmichael, 14 Law T. N. 8, 820, Ld. Romilly, as to setting apart a fund.

<sup>(</sup>b) Gillespie v. Alexander, 3 Rus. C. C. 130; Greig v. Somerville, 1 Russ. & M. 338. See, however, Davies v. Nicholson, 2 De G. & J. 693, as to the right of the creditor where the estate was not admistered by the Court, and where the facts were before the provisions of this Act.

Where the executor no longer holds as such, but as trustee.

It has been held, however, that where the executor no longer held the amount retained, in the character of executor, but had constituted himself trustee for the parties entitled, (a) that this would be equivalent to payment, so as to preclude the creditor from looking to the executor, as such, as having assets on hand to the extent of the amount retained, as to which he had become trustee.

Execr. proceeding in compliance tion has the same protection as if under decree.

An executor who has distributed the assets, after issuing advertisements in compliance with this section, will have with this sec. the same protection as if he had administered under decree of the Court (b).

The notices to be given.

The Act requires as a condition of its protection, that such and the like notices shall be given as in the opinion of the Court in which the executor is sought to be charged would have been given by the Court of Chancery in an administration suit. The proceedings in administration suits, and the notices to be given, are regulated by the orders in Chancery, 467 et seq. (c). The number of notices to be given, mode and place of publication, &c., depends on the circumstances of each case, regarding the nature of the business, domicile, knowledge or probability of there being foreign creditors, &c., (d). In ordinary cases, when there is no reason to suppose that there may be creditors residing at a distance, six weeks advertisement in a newspaper published in the county wherein the deceased died domiciled, is sufficient.

It is of the utmost importance, with a view to obtaining the protection of the Act, that the executor should not only give, but also preserve evidence of having given, such notices as would be deemed proper in the circumstances of the case, and that he should not proceed to distribute with The Act, it will be seen, points out no time undue haste.

<sup>(</sup>a) See remarks p. 38, under sec. 30 of this Act.

<sup>(</sup>b) Clegg v. Rowland, L. R. 3 Eq. 368; and see King v. Malcott, 9 Hare, 692. (c) See Taylor's Chan. Orders.

<sup>(</sup>d) See Brett v. Carmichael, 14 L. T. N. S. 820, as to setting apart a fund to meet possible claims.

within which distribution may be made. The party distributing must take on himself the responsibility of being able to satisfy the Court in which he may afterwards be sought to be charged. Possibly, under these circumstances, and considering that in cases of difficulty it is impossible In cases of to lay down any general rule, the executor might obtain doubt as to notices, time the advice and assistance of the Court, under sec. 31, as to of paying in, the notices to be given, the time of distribution, and the neces-asked modes asked under sity for setting apart a fund to meet contingent claims of s. 31. which he may have notice.

Creditors who have sent in their claims should be careful to preserve evidence of having done so.

## SECTION 28.

28. On the administration of the estate of any person dying In case of deafter the passing of this Act, in case of a deficiency of assets, ficiency of debts due to the Crown, and to the executor or administrator of debts to rank the deceased person, and debts to others, including therein pari passu, respectively debts by judgment, decree or order, and other debts and without of record, debts by specialty, simple contract debts, and such each other claims for damages as by statute are payable in like order of administration as simple contract debts—shall be paid pari Passu and without any preference or priority of debts of one rank or nature over those of another; but nothing herein contained Exception. shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal estate.

Possibly this section does not deprive a creditor of prior- Can a creditity to be obtained by first suing or obtaining judgment, or still acquire priority by not withstanding the enjoining that the debts referred to first suing or "be paid pari passu," and that the law in that respect re-getting judgmains unchanged; the only effect of the Act being to abolish the theretofore existing "preference or priority of debts of one rank or nature over those of another," and place all creditors in the same degree. The law had always been that if one of several creditors in the same degree sued and obtained judgment against the executor, his claim had to be satisfied before the others. And if one creditor commenced an action of which the executor had notice, he could

make no voluntary payment to another of the same degree. but if that other commenced a subsequent action, and first got judgment, he was entitled to the first payment (a). It would seem that the law as above is not varied by this

Can the exefer himself?

If this be so, it would seem to follow that an executor cutor still pre- has still the right of retainer and preference as to a debt due himself, and that he has even greater privileges than before the Act, inasmuch as then he could prefer himself only among those of equal degree; whereas now, as the Act places all in equal degree, he can prefer himself, though a mere simple contract creditor, even against the Crown. Still the matter is not quite clear.

### SECTION 29.

If an execunistrator rejects a claim. suit must be brought with-

29. In case the executor or administrator gives notice im tor or admi- writing to any creditor or other person of whose claims against the estate such executor or administrator has notice, or to the attorney or agent of such creditor or other person, that the said executor or administrator rejects or disputes such claim, it shall period, or be be the duty of the claimant to commence his suit in respect of barred. such claim, within six months after such written notice was given\_ in case the debt, or some part thereof, was due at the time of the notice, or within six months from the time the debt, or some part thereof, falls due, if no part thereof was due at the time of the said notice, and in default the said suit shall be forever barred.

> This is a provision much for the benefit of legatees, and facilitates the winding up the estate. The Act as to Quieting Titles proceeds on somewhat the same principle, ir enabling a person to force an adverse claimant to have hi: claim adjudicated on or be barred.

The case of a ing a writ and keeping it renewed without serving it.

It might perhaps have been proper to have provided than claimant issue the suit should be prosecuted "without delay," as is requir ed in replevin, for the letter of the Act may be compliewith by merely issuing a writ, and the spirit and intentioof the Act frustrated by not serving the writ, and yet keep ing it constantly renewed. If however the executor can properly appear to the writ without service of it, which it is said he may do (a), the difficulty would be obviated, as the practice of the Courts requires that proceedings subsequent to appearance shall be within definite periods.

## SECTION 30.

30. After the first day of January, one thousand eight hundred After 1st of and sixty-six, no suit or other proceeding shall be brought to Jan., 1866, a recover the personal estate, or any share of the personal estate suit to recover the personal estate, or any share of the personal estate ver personal of any person dying intestate, possessed by the legal personal repre-estate of an sentative of such intestate, but within the time within which the intestate, or same might be brought to recover a legacy, that is to say, within thereof, must twenty years next after a present right to receive the same, shall be brought have accrued to some person capable of giving a discharge for or within the same time as release of the same, unless in the meantime some part of such a suit for a estate or share, or some interest in respect thereof shall have been legacy. accounted for or paid, or some acknowledgment of the right the 24 V., c. thereto shall have been given in writing, signed by the person 38, s. 13. accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case, no such action or suit shall be brought but within twenty years after such accounting. Payment or acknowledgment, or the last of such accountings, Payments, or acknowledgments, if more than one was made or Riven.

The corresponding Imperial Act 23 & 24 Vic., c. 38, re-The correscites sec. 40 of c. 27, 3 & 4 Wm. IV, (Con. St. c. 88, s. 24,) ponding Imp. and that it is expedient that that enactment should extend to cases of intestacy. The Consolidated Statute applies to Con. St. c. a legacy payable solely out of personal estate (b); and 88, s 24. to a residue bequeathed by will of personal estate, (c); but it does not apply to a case of intestacy, or a partial intestacy, as a residue not disposed by the will of a testator; Does this section apply to and the present section does not, expressly at least, take in an undisposed of residue?

<sup>(</sup>a) Lush Pr. 3 ed. 392.

<sup>(</sup>b) Sheppard v. Duke, 9 Sim. 567; Ashwell's Will, John. 112; Bullock v. Downea. 9 H. of L. 14.

<sup>264.</sup> Prior v. Horniblow, 2 Y. & C. 200; Christian v. Devereux, 12 Sim. See also the cases in Wms. Exrs. 6 ed. 1874.

the latter case. It applies to assets distributed ministrator, but not to assets retained by him, the existence of such assets were unknown (a).

There are cases (b) decided on the Act of Willia

Cases wherein an executor who has aster of trustee held not entiof act.

vest an executor with the character of trustee.

in the benefit of that Act has been denied to an sumed character who has become clothed with the character of a t which event the ordinary rule applies that as tled to benefit trustee and cestui que trust time is not a bar. The arises however to ascertain when the executor can What acts in be regarded merely as such and becomes truste is said (d), this "is, it seems, in the case of a legac" by any act which amounts to an assent to the l and in the case of a residue, by its being ascertai out more specific appropriation, but not until it ascertained." As regards the case of a residue, howe is a discrepancy between the various decisions () legacy is bequeathed simpliciter, and not to the on trust, still, if the executor by any act of his himself trustee for the legatee, the principle of v. Munnings, will apply (g).

### SECTION 31.

Trustee, executor, &c., may apply by petition to Judge of Chancery for opinion, advice, &c., in

31. Any trustee, executor or administrator shall be without the institution of a suit, to apply by petiti Judge of the Court of Chancery, or by summons upor statement to any such Judge in Chambers, for th advice, or direction of such Judge on any question resp

<sup>(</sup>a) Reed v. Fenn, 35 L. J. Ch. 464.

<sup>(</sup>b) Phillipo v. Munnings, 2 My. & Cr. 309. See Harcour 28 Bea. 303.

<sup>(</sup>c) See Smith v. Day 2 M. & W. 684; Clegg v. Rowland, L. R Ewart v. Gordon; Ewart v. Dryden; Ewart v. Snyder, 13 Grant, Smith v. Smith, 1 Drew. & Sm. 884.

<sup>(</sup>d) Darby on Limitations, 119.

<sup>(</sup>e) Dix v. Burford, 19 Bea. 409. See judgment in Brougham 19 Bea. 183, 184.

<sup>(</sup>f) Wilmott v. Jenkins, 1 Bea. 401; Davenport v. Staffc 319; Bullock v. Downes, 9 H. L. Ca. 1; Dinsdale v. Dudding C, C, 265,

<sup>(</sup>g) Tyson v. Jackson, 30 Bea. 384; see also Clegg v. R. 3 Eq. 368.

management or administration of the trust property or the assets management. of any testator or intestate; such petition or statement to be &c., of trust accompanied by a certificate of counsel, to the effect that in his Imp. Act 22 judgment the case stated is a proper one for the opinion, advice, & 23 V. c. or direction of the Judge under this Act, and such application 35, s. 30. to be served upon, or the hearing thereof to be attended by, all persons interested in such application or such of them as the said Judge shall think expedient; and the trustee, executor or administrator acting upon the opinion, advice or direction given by the said Judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator, in the subject matter of the said application : Provided, nevertheless, that this Act shall not extend to indemnify any trustee, executor or administrator in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction; and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made.

In Lewin on Trusts it is said that, "in proceeding under Facts are not this enactment there is no investigation of facts, but the investigated, this enactment there is no investigation of facts, but the or affidavits correctness of the petition or statement is assumed, and if shewing them, there be any suppressio veri, or suggestio falsi, the order produced. of the Court, pro tanto, is no indemnity to the trustee." No affidavits therefore ought to be filed, and the costs of them would be disallowed (a). It would seem that the order of The party the Court will be no indemnity, even though the mistate- applying not ment or concealment were not wilful (b): the language of statements the proviso affords, however, a strong argument against this untrue.

The Court will not advise on questions of construction, No advice on or difficult questions of law, affecting the rights of the questions of Parties interested (c), nor on matters of detail which cannot or of law.

<sup>(</sup>a) Re Muggeridge's Trusts, 1 John. 625; Re Mockett's Will, ib. 628; Re Barrington's settlement, 1 John. & H. 142.

<sup>(</sup>b) Re Barrington's settlement, supra, per Wood, V. C.; Re Dennis Will, 5 J. N. S. 1388, per Stuart, V. C.

<sup>(</sup>c) Mockett's Will, supra; Re Hooper's Estate, 9 W. R. 729; Re Lorent's settlement, 1 Drew. & Sm. 401; Re Evans, 30 Bea. 232.

be properly dealt with without the superintendence Court, and the assistance of affidavits (a).

Cases wherein the court will advise.

The Court will advise as to investment of trus payment of debts, questions as to relinquishing promising doubtful claims, postponement of convers priety of conversion of raw material into manu articles (b), and matters of that character: It wou also that executors and administrators might, in difficulty, properly ask advice as to notices to be gi time of distribution, under sec. 27 (c), and the r for setting apart a fund to meet contingent cla

The petition.

The petition should state distinctly the particular tion whereon advice &c. is sought, and not merely s facts, and ask for advice generally, (e)

Service of petition.

It has been held that the petition should not, in instance be served on any one, but that application be made in Chambers as to the parties on whom should be made (f). But Kindersly, V.C., stated Judges had agreed on a different practice, and held petitioner must serve such as he thinks proper, bring on the petition merely with a view to ascert should be served (q).

Petition of interested.

The Court will act on the petition of a cestui que one of several or of one of several trustees (i).

This section applies to cases arising on instrume Section is retrospective, cuted before the Act (k).

### SECTION 32

32. Every deed, will, or other document creating Every trust instrument to either expressly or by implication, shall, without pre be deemed to the clauses actually contained therein, be deemed to contain clauses for the in clause in the words or to the effect following, that is t

<sup>(</sup>a) Re Barrington's settlement, 1 Johns. & Hem. 142.

<sup>(</sup>b) Re Caldwell Estate, 2 Ch. Chamb. Rep. 150.

<sup>(</sup>c) See remarks on that section. (d) See remarks on sec.

<sup>(</sup>e) Re Lorenz, supra.

<sup>(</sup>f) Re Muggeridge, sup

<sup>(</sup>g) Re Green, 6 J. N. S. 530.

<sup>(</sup>h) Re Ward, 14 W. R.

<sup>(</sup>i) Re Muggeridge, supra.

<sup>(</sup>k) In re Simson, 1 John

"That the trustees or trustee, for the time being, of the said demnity and deed, will or other instrument, shall be respectively charge reimburseable only for such moneys, stocks, funds, and securities as trustees. they shall respectively actually receive, notwithstanding their Imp Act 22 respectively signing any receipt for the sake of conformity & 23 V. c. 35, s. 31. and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited; nor for the insufficiency or deficiency of any stocks, funds, or securities: nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being, of the mid deed, will or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts on powers of the said deed, will or other instrument."

In the Bill, as introduced by Lord St. Leonards, the sec- The gist of tion corresponding to this contained a declaration that the the Imp. enactment was a clause referred to should be construed favorably to trustees, clause that it which declaration was in fact the gist of the proposed should be enactment, for reasons which will presently appear. This favorably to declaration was, however, struck out in the Commons, trustees. though the whole section was introduced simply with a view to its enactment (a).

The clause referred to in this section has been commonly The indemniused by conveyancers for many years, but latterly it has ty professed to be given met with disapproval as tending to mislead. It has been not to be said that the clause adds nothing to the security of the relied on. trustee; that equity infuses such a proviso into every trust deed, and that the Court has regarded it as immaterial whether a trust deed contains such a provision or not (b). It is superfluous where there is no default, and unavailing where there is. Thus where a trustee signs a receipt with a co-trustee for the sake of conformity merely, (the person . Paying being entitled to, and indeed secure only on, the joint receipt) (c), he could always shew that he was not

<sup>(</sup>a) Sugden Stat. 2 ed. 323. (b) Lewin on Trusts, 3 ed. 317.

chargeable for the receipt of the moneys, and that they were in fact received by his co-trustee: on the other hand, if he unnecessarily allow his co-trustee to retain the money, or do not see to its proper application and investment, this section will not protect him on loss consequent on such neglect (a), "nor will the protection purporting to be given in respect of the insufficiency and deficiency of securities and in respect of any other losses not happening through the wilful default of the trustees, in any manner exonerate them from the diligence and vigilance which they are bound to use, as well in respect of the selection of investments, as in other matters pertaining to the trust." (b).

In one case (c) the indemnity clause was to the effect given in this section, and to it was added "that no trustee payin\_ or consenting to the payment to a co-trustee, with a bond for intention of accelerating the trust, shall be responsible f the conduct or misconduct of the trustee receiving the same, nor answerable for his application or misapplicatioof such money, or any part thereof," A suit was institute charging the trustee with breaches of trust, whereby the trust funds had been lost; what the particular breaches we does not appear. The defendant said he took no more thaa formal and nominal part in the trust, but admitted the he had signed some receipts, after signature by his co-trus tee, which enabled the co-trustee to receive the money and he relied on the indemnity clause. The following : the judgment of the Master of the Rolls: "I am of opinion that this clause does not exonerate a trustee from the cor sequences of any acts by which the money has been misar plied. This clause is constantly brought forward to sand tion the misapplication of trust moneys, but until it provided by the instrument creating the trust, that the trustee shall be liable for no breach of trust, provided & does not obtain a personal advantage, I shall not consid-

<sup>(</sup>a) See Lewin on Trusts, 3 ed. 305; see also notes to Townley v. Sharborne, and Brice v. Stokes, 2 W. & T. Lg. Ca. Eq. 793.

<sup>(</sup>b) Davidson Conv. Vol. 3, 2 ed. 182.

<sup>(</sup>c) Brumridge v. Brumridge, 27 Bea. 5.

the clause as giving a trustee the right or liberty of conniving at a breach of trust. Even if an instrument containing such an inconsistent clause were brought before me, I express to opinion on the result; but until it is, I cannot allow a trustee to say, that it is not his business to act properly in the performance of his duty as trustee. The defendant is liable, because, by signing the receipt, he has enabled his co-trustee to obtain and misapply the trust money."

It may be gathered from what is above stated that the clause in question does not vary the law for the protection of trustees; it is important that the law on the subject should be known, as it is said that the clause tends to mislead by its being taken by trustees in a strict literal sense (a). The above cases are based on the principle that a trustee should either decline the trust, or resign it, unless he is prepared to devote to it as much attention as he would to his own affairs, or rather, perhaps, as an ordinarily careful and prudent man would to his own affairs (b). Still, as above stated, Lord St. Leonards had in view in introducing the

<sup>(</sup>a) 3 Davidson Conv. 2 ed. 184.

<sup>(</sup>b) In Bostock v. Floyer, L. R. 1 Eq. 26, a trustee had handed a sum of £400 to his solicitor, a man of "good repute and extensive practice," as stated in the report, to invest. The solicitor professed to have invested the sum, and handed the trustee a bundle of deeds, &c., relating to the title, including a document purporting to be a copy of court roll, and to shew that one Stephenson had made a surender of the copyholds in question to the trustee as security for the £400. From the time of the alleged investment, in 1853, to the death of the solicitor, in 1863, the interest was regularly paid through the solicitor. Nothing appeared in the lifetime of the solicitor to raise any doubts as to his integrity; but shortly after his death it was discovered that he had been fully of gross fraud, had never advanced the money to Stephenson, and that no surrender had in fact been made by Stephenson. There was no receipt by Stephenson for the money among the papers handed over by the solicitor to the trustee. The Master of the Rolls in giving judgment said: "The case is too clear for argument; the liability of the trustee is a matter of every day occurrence in the Court. If the trustee had handed over the £400 to the solicitor, and he had not invested it at all, but simply retained it for his own use, there could be no doubt of the trustee's liability. This is simply the case of a person employing his servant to do as act, and the servant deceiving him; and any loss so occasioned must fall on the employer, and not on the cestui quetrust. Of the two innocent persons, therefore, one of whom must suffer by the wrongful act of the solicitor, the loss must fall on the trustee who employed him, and did not

section corresponding to this, that the law should be relaxed in favor of trustees (a); and the English Legislature has recently conferred benefits in aid of informal conveyancing, and powers on those occupying a fiduciary position (b).

## SECTION 33.

In case of persons dving after 31st De-

33. When any person shall, after the thirty-first of December, one thousand eight hundred and sixty-five, die seized of or entitled siter 31st December, 1865, to any estate or interest in any laud or other hereditaments, mortzages on which shall at the time of his death be charged with the payment his real prop of any sum or sums of money by way of mortgage, and such erty to be

> take all the precautions he might have taken against being deceived. The fund must be replaced with interest at 4 per cent.'

In the same case the Master of the Rolls referred to another of a similar nature, which had been before him, as follows: "The solicitors, exercising every possible precaution found what appeared to be an unimpeachable security on freeholds vested in A. B. in fee simple; but the title to which depended on a forgery by A. B. In that case I had considerable doubt whether the trustee could be made liable for the loss occasioned; but I was not called on to decide the point.'

In ex parte Lewis, 1 Gl. & J. 69, assignees of a bankrupt put up the estate in two lots, and bought them in bona fide; afterwards, on a resale, there was a gain on one lot and a loss on the other, the balance on the whole being in favor of the estate; they were compelled to account for the diminution of price on the one lot without being allowed to set off the increase on the other. In Lewin on Trusts, it is said that the same principle was applied to trustees in Taylor v. Tabrum, 6 Sim. 281. In England, in cases of this nature, trustees are protected by 23 & 24 Vic.c.

In Robinson v. Robinson, 11 Bea. 371, it was held that where trustees had made several distinct investments not authorized by the trust, on some of which a loss had occurred, and on others a gain, that they should be charged with the loss, and also account for the gain, without any right of sot off. This case was reversed on another point, not, however, affecting the decision on this question. The principle of this case is that the trustee shall derive no benefit whatever, directly or indirectly, from a dealing with trust funds, or from a breach of trust, and that by being allowed to set off he would virtually either not have been made responsible for the breach of trust, or have profited by his dealing with the funds. Lord St. Leonards, in 1859, introduced a bill to relieve it such cases; (W. & T. Lg. Ca. Eq. vol. 2, 2 ed. 748); and considering the difficulty there sometimes is in knowing on what securities trustees may invest under the various clauses for investment, without being guilty of a breach of trust, (Mant v. Leith, 15 Bea. 524), the case has an appear ance of hardship.

(a) A Bill was also introduced by Lord St. Leonards, in 1859, to al low trustees to set off gains against losses on investments not authorized by the trust.

(b) Imp. Stat. 23 & 24 Vic, c, 145,

person shall not, by his will or deed, or other document, have paid out of signified any contrary or other intention, the heir or devisee to such property whom such land or hereditaments shall descend or be devised, his personal shall not be entitled to have the mortgage debt discharged or estate. satisfied out of the personal estate, or any other real estate of such Imp. Act 17 & 18 V., c. person, but the lands and hereditaments so charged shall, as 113 between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof; Provided Proviso. always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debts, either out of the personal estate of the person so dving as aforesaid or otherwise; Provided also, that nothing herein contained shall affect Proviso. the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January, one thousand eight hundred and sixty-six.

This section is taken from an Imperial Act commonly known as Locke King's Act.

Prior to the Act, in accordance with the general rule that The old law. the personal estate is the primary fund for payment of debts, the heir-at-law or devisee was entitled to have the mortgage debt paid out of such estate, and the land thus exonerated, if the debt were of the devisor's or testator's own contracting or had been adopted by him as his own (a).

The Act extends only to "any estate or interest in any lands or other hereditaments," and therefore as regards pro-Perty not within those terms the law remains as before.

The section does not extend to leaseholds (b), by reason This section of its referring to descent and devise, heir and devisee; does not apply to chattels and the 21st section would not make it so apply.

It does not apply to the lien of a vendor for unpaid pur-nor to vendchase money (c), and such a lien is not a "mortgage" within or's lien,

<sup>(</sup>a) As to what does or does not amount to an adoption of the debt, be notes to Duke of Ancaster v. Mayer, 1 W. & T. Lg. Ca. 580.

<sup>(</sup>b) Solomon v. Solomon, 10 Jur. N. S. 331.

<sup>(</sup>c) Hood v. Hood, 3 J. N. S. 684.

the Act: but it applies to an equitable mortgage by deposit of title deeds (a).

nor to a mere eral charge on

It applies only where there is a defined and specific charge indefinite gen- on a specified estate; and a general charge on real estate realir in aid by a testator in aid of his personal estate, does not come of personalty, within the definition of a "mortgage" on the real estate in the hands of the devisee, unless and until the amount has been accurately defined, and the devisee has expressly taken the estate subject to such ascertained charge (b).

An heir taking by descent after the operation of the Act will not come within the last proviso, and so will not be entitled to exoneration, though the mortgage reserving the equity of redemption to the mortgagor and his heirs was executed before 1st January, 1866; for he takes immedi-The time of ately from his ancestor, and not under the deed (c): neither would be be so entitled merely because the personalty is bequeathed by a will made before 1866 (d). Where a deviseclaims under a will dated before 1866, he will be within thprovise, and entitled to experation, though the devisemay have executed another will after that date, which, with out affecting the devise, operates as a republication of the w:::: < :

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As regards the signification of a "contrary or other inat "costrary tention" in respect of non-experiention, it has been held them.1 a mere direction by the testator that his debts "shall bepaid as soon as may be " | f. or should be paid by his "e enters out of his estate" | f. which would include reseate that or merely "out of his estate" | h. is not a sufficient to indication of intention that the mortgaged estate should De ioseniai

<sup>2</sup> Paul brooks v. Frank. 11. 4 H. 182: Colchy v. Colchy. L. 2 Sec. 30%

Hermania v H.S. 20 New 47th . Physic v. Piper, 1 J. & H. 91.

France, France Street Set.

<sup>1</sup> Beild v. Prove. 12 L. S. Cha. 471.

Propheroday v French 11 4 H. 192.

A reinforcest v. Wichnoncest C. D. G. F. & Jo. 347; see Seer. 188 When V. C. is Proposed v. Trans. super.

A Principle of Lawrence, L. & 1 Sec. 1.

Where, however, the personal estate is bequeathed on trust pay (a), or the bequest thereof is "subject to the payent of all (the testator's) debts "(b) a sufficient intention is shewn that the mortgage debt shall be paid, and the land exonerated: under a direction to pay debts, mortgage debts are included. In Fisher on Mortgages, the law is thus stated: " a bequest of residuary property on trust to sell and pay debts, (even though specialty debts be mentioned which do not include the mortgage debts), (c) or any provision of separate fund for the debt (d), have been held to shew that the mortgaged estate was experated by the fund provided: the circumstances that the testator had not distinguished that debt from other debts, that no special mode of Payment had been provided for it, and that the devisee of the mortgaged estate was also an executor who was directed to pay the debts, and the consideration that a gift of pro-Perty after payment of a debt is a gift of so much only as remains after payment of it, and therefore cannot be claimed by the donee free from it, being considered to strengthen the above conclusion."

It must be borne in mind that English cases on wills Cases in Eng executed after 1867 do not apply here, so far as regards a land on wills general direction that the debts or all the debts be paid inapplicable out of personalty, as the Imp. Act 30 & 31 Vic. c. 69, here as redeclares that such direction "shall not be deemed a declar-tionthat debts ation of an intention contrary to the rule [against exone-be paid out ration—Ed.] established by the [prior] act, unless such contrary, or other intention shall be further declared by words expressly, or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate."

By the same act the word "mortgage" in the prior act and the same made to extend to a vendor's lien on lands purchased by as to vendor's lien. a testator.

<sup>(</sup>a) Moore v. Moore, 1 De G. Jo. & Sm. 602.

<sup>(</sup>b) Eno v. Tatham, 4 Giff, 181; Mellish v. Vallins, 2 J. & H. 194.

<sup>(</sup>c) Porcher v. Wilson, 12 W. R. 1001.

<sup>(</sup>d) Eno v. Tatam; Mellish v. Vallins; Moore v. Moore, supra; Smith Smith, 3 Giff. 263; Maxwell v. Hyslop, L. R. 4 Eq. 407.

## CON STAT. CH. 90.

An Act respecting the Transfer of Real Pro perty, and the liability of certain interest therein to Execution.

Taken from Imp. Stat. 8 & 9 Vic. c. 106.

This Act is taken mainly from the Imp. Stat. 8 and 2 Vic. ch. 106; its history is as follows: The Imp. Stat. 7 and 8 Vic., c. 76 was passed, having for its objects some of the features embraced in the later Act. but as it was somewhas faulty, for the reasons given by Mr. Ker in his letter tad the Lord Chancellor (a), it was repealed by the Stat. 8 and 9 Vic. ch. 106, which was based on the suggestions in Man-Ker's letter, (indeed framed by him), and which re-introducein different shape some of the features of the repealed Ac and made other new enactments. Our Stat. 12 Vic. ch. 71 was taken from the first Imp. Stat., and was repealed as tal most of its clauses by 14 and 15 Vic. ch. 7, which, except it i one or two particulars hereafter alluded to, followed the Imp. Stat. 8 and 9 Vic. ch. 106.

### SECTION 1.

Interpretawords in this Act.

The words and expressions hereinafter mentioned, which in tion of certain their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act excludes such construction, be interpreted as follows, that is to say: the word "Land" shall extend to messuages, lands, tenements and hereditaments. whether corporeal or incorporeal, and to any undivided share thereof, and to any estate or interest therein, and to money subject to be invested in the purchase of land or of any interest therein; the word "Conveyance" shall extend to a feoffment, grant, lease, surrender, or other assurance of land. c. 71, s. 1.

<sup>(</sup>a) See letter in Appendix.

### SECTION 2

2 All corporeal tenements and hereditaments shall, as regards Corporeal the conveyance of the immediate freehold thereof, be deemed to tenements, deemed to lie lie in grant as well as in livery, 14, 15 V., c. 7, s. 2. in grant.

The Common Law loved simplicity and notoriety; all it required for the creation or transfer of a freehold estate in Possession was a mere oral gift, coupled with livery of seisin, the gift being incomplete without livery, unless by way of release or surrender to the next in estate, or by matter of record. Corporeal hereditaments were therefore said to lie in livery. Incorporeal hereditaments of certain kinds, as for Instance a freehold remainder created de novo out of lands in possession required livery, (a) and the estate arose and cook effect out of the seisin of the feoffor, but all existing incorporeal hereditaments, inasmuch as no livery could from their nature be made of them, were transferred by way of grant, and were therefore said to lie in grant.

To the perfection of a conveyance by way of grant, a deed was requisite at Common Law (b). After the passing of the Statute of Uses, conveyancers availed themselves of its provisions to avoid the necessity of making livery, and conveyances by way of bargain and sale, and lease and release were Bargain and adopted. The first of these modes had many disadvantages (c); sale. Lease it was ineffective as such, if not based on a consideration of money, or money's worth; to pass a freehold estate it was necessary by the Statute of Enrolments, 27 H. 8, ch. 10, that it should be by deed, indented and enrolled: general powers, as to appoint or grant leases cannot be engrafted on a bargain and sale, (d) and it is not adapted to certain limitations as by way of shifting or springing use in the usual frame and limitations of marriage settlement. There must

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<sup>(</sup>a) Smith Rl Prop. 655, 3rd ed. (b) Co. Litt. 9 b, 172a.

<sup>(</sup>c) As to these and other matters relating thereto, see Blackstone by leith, p. 298; and, post, remarks under s. 14.

<sup>(</sup>d) Gilbert Uses, 46; Sugden on Powers, 138; Watk. Conv. 9th ed. 357.

be an estate in the bargainor of which seisin can be had and not a mere right, contingency or possibility (a). For these reasons the conveyance by way of lease and release had in England, at least in all special conveyancing, entirely superseded the bargain and sale; the release operating as a conveyance at Common Law, and not by way of transmutation of possession. There was also the further reason and advantage, viz.: that the lease though operating under the Statute of Uses as a bargain and sale for a term, still did not require enrolment, as the Statute of Enrolments only applied to freehold estates. The disadvantage was that two deeds were requisite, and the lease was frequently lost and incapable of proof, and so the release, as such, in operative

Object and effect of section 2.

The object and effect of the Statute is to give to the conveyance by way of grant, all the advantages with non. of the disadvantages above explained attendant on that bway of lease and release (b). Being the creature of th. Act it is not, of course, a Common Law conveyance as re gards an immediate freehold, but it will operate in the same way as regards all uses and powers declared, and shoul adopted in every case where the facts do nc render other modes of conveyance, as by way of surrende: assignment, release, &c., more appropriate. The word grazis the only operative word used in the Act respecting show forms of conveyances, Con. Stat. c. 91, from which, how ever, it must not be inferred that as an operative word it i to supersede all others; such was not the intention of the Legislature; in fact, the use of the word grant in the original Act, 9 Vic. ch. 6, was, as hereafter explained (c) in treating of that Act, a singular mistake of the Legislature, which may have led to fatal consequences if uses were declared. for on the passing of that Act lands did not lie in grant, The operative word of conveyance therefore should be such as is appropriate to the facts; thus, if tenant for life in possession conveys to him next in remainder or reversion

<sup>(</sup>a) Watk. Conv. 9th ed. 355. (b) See 12 Vic. c. 71 sec. 2.

<sup>(</sup>c) See post Con. Stat. c. 91, p. 100.

in fee. the operative word should be surrender, for in that character the conveyance operates, and should be pleaded as such.

The word grant has a most extensive operation, it may Operation of Operate as a surrender, lease, release, assignment or other the word assurance, as the circumstance may require (a). So also a grant may Conveyances, with other operative words and intended to operate as a conveyance take effect in other modes, may operate as a grant, or con-of different Veyance of another character (b). But it has been held nature. that the mere words "remise, release, and quit claim," will tive words not operate as a grant (c).

The immediate freehold only is affected by the Act; by effect as a grant, &c. this term is meant the first of the existing estates of free-Immediate hold: there was no necessity for more extended operation freehold only to the Act, as other estates of freehold in remainder or referred to. reversion lay in grant at Common Law, as being incorporeal in their nature, whereof no livery could be made.

Questions have sometimes arisen as to the mode in which Where the a conveyance is to take effect, when it could operate either words grant, as a Common Law conveyance, or under the Statute of sell, are the Uses by transmutation of possession, and in ill-framed con-operative veyances since this Act, questions of the same nature may the conveyarise. Thus if A, seized in fee, should, for a pecuniary con- ance operate sideration expressed to be paid by B, grant, bargain and sell or as a barto B to the use of C; in whom is the legal estate? A question gain and sale? only settled by determining whether the deed operates under this Act as a statutory grant, operating like a Common Law conveyance, or as a bargain and sale, under the Statute of Uses. So again, if A, using the operative word grant only, has conveyed to B, to the use of or in trust for C, on a pecuniary consideration expressed, and the intention were manifest that B should have the legal, and C only the equitable estate, would the deed to carry out such

may take

<sup>(</sup>a) Co. Litt. 301 b; Davidson Conv. vol. 1, 3rd ed. p. 69.

<sup>(</sup>b) Cameron v. Gunn, 25 Q. B. U. C. 77; Acre v. Livingstone, 26 Q.

<sup>(</sup>c) Acre v. Livingston, supra, Hagarty J. diss.; see remarks on Con. Stat. c. 91, post, p. 100.

intention be construed to operate as a bargain and sale on the principles above referred to (a)? It would seem that, in the first case put certainly, and in the second case probably, the intention as collected from the whole deed would govern; if no intention were apparent the grantee might elect (b). In some cases it is said that where a deed may operate at Common Law, or by way of use, it shall operate under the former mode, unless the grantee otherwise elect for his benefit (c); but in applying this principle it must be borne in mind that a conveyance operating under this Act is not of course a Common Law conveyance, though it operates as such in regard to the uses declared by it.

## SECTION 3.

Feoffments, 3. A feoffment, otherwise than by deed, shall be void at lawunless by deed to be void.

and no feoffment shall have any tortious operation. 14, 15 V
c. 7, s. 3.

Feoffments.

As mentioned under the last section, a mere oral gift wasufficient to convey a freehold at Common Law, but liver of seisin was requisite; a charter usually accompanied the feoffment as evidence of the transaction, and was therefor worded in the past as well as the present tense; a form which is uselessly (except in deeds of disclaimer) sometimes continued in conveyances at the present day. By the Statute of Frauds a writing and signature were enjoined, annow sealing is requisite: it would seem, however, that it popen to contention that the sealing and delivery by the part creating the estate will supersede the necessity of his signature, notwithstanding the Statute of Frauds, and the not only as to feoffments but as to other assurances (d).

Effect of.

A feoffment was an assurance of greater power than an\_

<sup>(</sup>a) Ante p. 51.

<sup>(</sup>b) Shelford Statutes, 729, note v, 7 ed. and cases there cited; Smi 

Rl. Prop. 3 ed. 866; 1 Hayes Conv. 5 ed. 162; Roe v. Tranmarr,

Smith, Lg. Ca. 5 ed. 450; Haigh v. Jaggar, 16 M. & W. 526.

<sup>(</sup>c) Haigh v. Jaggar, 16 M. & W. 541; Heyward's case, 2 Rep. 35 Miller v. Green, 8 Bing. 92.

<sup>(</sup>d) Cherry v. Heming, 4 Ex. 631; Aveline v. Whisson, 4 M. & G. 80 4 Tupper v. Foulkes, 9 C. B. N. S. 797, arguendo; see further post, pp. 60,

other (a). By it, contingent remainders depending on particular estates could be barred or destroyed (b); it destroved powers appendant or in gross; if made by tenant in tail in possession, for a fee simple absolute, it worked a discontinuance, which tolled or took away the right of entry of the issue in tail, as also of the remainder-man or reversioner, and left but a right of action, to be enforced by the peculiar writ of formedon (c); when made by a person in actual possession, though wrongfully so, yet if Tenant for a not a mere temporary trespasser, it had the effect of pass-less estate ing by wrong the estate of which feoffment was made; a fee by thus, on a feoffment in fee by a disseisor or mere tenant wrong, at will, the feoffee took a fee by wrong, the true owner of the freehold was disseised, remainders and reversion, if any, were divested or displaced, so that each (strictly speaking) ceased to have any estate, which was turned to a right to be enforced on proper occasion (d). The consequence of any but such such tortious conveyance (other than by tenant in tail) worked a forwas immediate forfeiture of the feoffor's estate (e). As by the Act a feoffment has no longer a tortious operation, so now it will work no forfeiture (f).

#### SECTION 4.

4. A partition and an exchange of any land, and a lease required Partition or by law to be in writing of any land, and an assignment of a exchange of Land, &c., chattel interest in any land, and a surrender in writing of any unless by deed land, not being an interest which might by law have been created to be void. without writing, shall be void at law, unless made by deed. 14, 15 V. c. 7, s. 4.

Parceners, inasmuch as the estate in co-parcenary was cast on them by act of law, were at Common Law compellable to make partition, and might have done so by

<sup>(</sup>a) See Smith's Real Prop. 3 ed. 651. (b) Archer's case, 1 Rep. 66 b. (c) Co. Litt. 327. A discontinuance no longer tolls a right of entry, Con. St. ch. 27, sec. 80, and the writ of formedon is abolished with real actions.

<sup>(</sup>d) 1 Bl. Com. by Stephen, 519; Co. Litt. 327; Smith Rl. Prop. 3 ed. 651.

<sup>(</sup>e) 2 Bl. Com. 274. (f) Shelford Sts. 7 ed. p. 624, note k.

how enforced at common

parol (a): tenants in common and joint tenants v compellable by 31 H. 8, c. 1, & 32 H. 8, c. 32 (6). The law and under was enforced by writ of partition, proceedings on wh early statutes, regulated by 8 & 9 Wm. 3, ch. 31: this writ abolished (c) and other modes of partition sub

in equity,

The right of partition also existed, and might ha enforced, in equity (d); so may it yet; in fact, as equitable fees simple, the Court of Chancerv has e jurisdiction (e). The power of a Court of Equity partition in cases of legal estates was placed Eldon on the ground of extreme difficulty attending of partition at law; this was complained of as t on the writ of partition, as an usurpation of autho as wresting from the Courts of Common Law their exclusive jurisdiction (f). Partition is now compe

32 Vic. c. 33. the Act of 32 Vic., and regulated by that Statute: Con. St. c. 82. Stat. c. 82. secs. 46, 47, 48, 49, under which also b tions to sell, the difficulties which arose formerly: partible nature of the property can be overcome.

How made at common law.

Parceners being compellable at Common Law partition, might have done so, as to things lving. or grant, without deed, so also might tenants in con to things lying in livery (g); but joint tenants of f corporeal or incorporeal, and tenants in common poreal hereditaments where no livery was had, or have made partition without deed, by reason of tutes (h).

Prior to this Act the Statute of Frauds enjoined and all voluntary partitions are required to be by the Act of 32 Vic.

Effect of deed of partition.

As between parceners, the effect of a deed of was less than a grant. It did not operate by a ne

<sup>(</sup>a) 2 Bl. Com. 189; Watkins Conv. 9 ed. 153, note.

<sup>(</sup>b) 2 Bl. Com. 185, 194. (c) Con. Stat. c. 27, sec. 78

<sup>(</sup>d) Agar v. Fairfax, 17 Ves. 533; 2 W. & T. Lg. Ca. 2 ed.

<sup>(</sup>e) 32 Vic. c. 33, ss. 38, 43, 44.

<sup>(</sup>f) Note by Hargrave to Co. Litt. 169 a.

<sup>(</sup>g) Litt. s. 250; Co. Litt. 169 a. (h) Co. Litt. 169 a.

titure of the seisin, as parceners had already the entire seisin by descent; it simply dissevered the unity of possession, and made no degree in the title: thus land derived to parte maternal would still partake of the quality of a maternal estate for purposes of descent.

It may be questionable whether an estate can now de-Can an estate send in co-parcenary, as Con. Stat. ch. 82, s. 38 directs that in co-parcenary when an inheritance descends, the heirs shall take as tenants in common.

As between parceners also there was a condition im- On partition. plied in law that if either were evicted after partition, she warranty implied on evicmight re-enter on the other shares and avoid the partition; tion. if however she had aliened her whole estate, neither she nor her alienee had any right of re-entry (a). Such condition did not exist between joint tenants and tenants in The reason is said to be that as at Common Law parceners were compellable to make partition that law took care that they should not be prejudiced thereby (b). Whatever may be the effect of the Act of 32 Vic., as to right of re-entry in cases governed by it (see sec. 24), and subject also to the question above alluded to as to whether estates can now descend in co-parcenary, it would seem that at least on a voluntary partition of an existing estate in co-parcenary, a condition of re-entry, as at Common law, will still be implied, and section 10 of this Act does not restrain such result. The Imperial Act expressly enacts that a partition shall not imply a condition of re-entry.

An exchange (c) is a mutual grant of equal interests, Exchange. the one in consideration of the other, as a fee for a fee, an estate for life for an estate for life, perfect only on actual entry.

The word exchange is the only operative word, and is The word

 $<sup>^{(</sup>a)}$  Smith Rl. Prop. 684, 3rd ed., referring to 2 Cruise Te. 19, s. 30; Burton, 319; Co. Litt. 173 b.

<sup>(</sup>b) Smith Rl. Prop. 3rd ed. 685.

<sup>(</sup>c) See further, Smith Rl. Prop. 3rd ed. 676; Watkins, 9th ed. 237; 2 Rl. Com. 322.

exchange indispensable.

indispensable to this mode of conveyance (a): thus, indower, a plea that the husband of demandant exchanged lands for those in question, and that demandant elected take dower out of the other lands, was held not proven by an ordinary deed of bargain and sale from the husband form a consideration therein expressed of £600 (b).

An exchange at Common Law could only be between two parties, but the number of persons composing each part was immaterial; the reason was that the implied warrant of title could not be carried out if there were more partie than two (c).

Implied warranty of title.

On every exchange there was an implied warranty citile, if the word exchange were used; so that on the actuse eviction of either party or his heirs, the party evicted could re-enter on the land given in exchange, and avoid the exchange in whole or pro tanto: but this did not extend to alienees (d). By section 10 of this Act the implied was ranty is abolished.

When required to be by deed, &c.

At Common Law if the estates conveyed lay only grant, or if the properties were in several counties, the exchange had to be by deed. By the Statute of Frau writing was enjoined, and now a deed is requisite.

Leases.

At Common Law a lease for life required to be creat—ec by livery, but a lease for a less estate might be by par—ol. Till entry, on a lease operating at Common Law and remot under the Statute of Uses, the lessee has but an interesse termini, and can bring no action of trespass, and receive no release of the reversion.

at Common Law.

Statute of Frauds.

The first four sections of the Statute of Frauds are follows:

Sec. 1. All leases, estates, interests of freehold, or terms years, or any uncertain interest of, in, to or out of any messuage manors, lands, tenements, or hereditaments, made or created livery of seisin only, or by parol, and not put in writing

<sup>(</sup>a) Watk. 9 ed. 329; Co. Litt. 50 b., note (1) by Harg.; Towsley Smith, 12 Q. B. U. C. 555.

<sup>(</sup>b) Towsley v. Smith, supra; Stafford v. Trueman, 7 U. C. C. P.
(c) Co. Litt. 50b, note 1; 51a, note 1. (d) Smith Rl. Prop. 675 -

uned by the parties so making or creating the same, or their Statute of seems thereunto lawfully authorized by writing, shall have the Frands. have and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary, notwithstanding.

- Sec. 2. Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term, shall amount unto two-third parts, at least, of the full improved value of the thing demined.
- Sec. 3. And moreover, that no leases, estates or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, shall be assigned. granted, or surrendered, unless it be by deed, or note in writing, aigned by the party so assigning, granting or surrendering the mane, or their agents thereunto lawfully authorized by writing, or by act and operation of law.
- Sec. 4. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer demages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon agreement made upon consideration of marriage; or upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action ahall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

The 1st section appears to relate to cases where an estate The bearing or interest is created de novo, and actually passes to the of the first lessee or grantee; the 3rd section to cases where an estate of Statute of or interest previously existing is transferred; and the Frauds. 4th action to cases where a right of action only is created by an agreement, or where an agreement is made respect-

ing the future creation or transfer of an estate or interest ( The 4th section also must be read as though the wor agreement on were interlined before the word sale, thou there are cases to the contrary (b). To this section also t exception created by section 2 from the effect of section does not apply; consequently an agreement by parol for lease for any short period though within section 2, ca not be enforced (c). So also such exception does 1 apply to section 3, and therefore all existing estates a interests, for however short a period or however uncerta must be assigned or surrendered in writing unless by of law; and if such estate or interest were such as unc section 1 required to be created by writing, then by the Con. Stat. the assignment or surrender, unless by act law, must be by deed (d).

Whether an instrument is a present de-

There is frequently great difficulty in determini whether an instrument is intended to operate, and do mise or only operate, as a present demise, or merely as an agreeme an agreement and vice versa (e); in fact some care is requisite in frami an agreement for a lease not requisite to be in writing, prevent its operating as an actual lease; to add to the c ficulty, cases varied as to whether or not this Act mal any difference in regard to the question; the later ca favor the construing as an agreement an instrument wh as a lease would be void (f). In one case (g), Bramw B., said: "It seems to me that in Stratton v. Pettit (16 C. 420), the Court made this mistake. Whereas before the St 8 and 9 Vic., c. 106 passed, it involved no inconvenier that certain words should be interpreted as an actual

<sup>(</sup>a) Smith Rl. Prop. 3 ed. 300. (b) Sug. Vend. 13 ed. 98; 14 ed. 1 (c) Ib.

Hogan v. Berry, 24 Q. B. U. C. 346; which would seem to h been a case of an uncertain interest.

<sup>1</sup>et Shelf. Rl. Prop. Sts. 7 ed. 620, and cases there cited; Addi Contracts, 316, 5 ed.

<sup>(</sup>f) Rollason v. Leon, 7 H. & N. 77; Hayne v. Cummings, 16 C. N. S. 421; see also Tidey v. Mollett, 16 C. B. N. S. 298, and Strank St. John, L. R. 2 C. P. 376, per Willes, J.; semble. Stratton v. Pe

<sup>(</sup>g) Rollsson v. Leon, 7 H. & N. 77.

mise (an instrument void as a lease for want of signature being also void as an agreement.—Ed.); yet when that Statute passed and made the same reasoning inapplicable. and rendered it impossible that parties using words of agreement should have intended to create a lease, the Court still held the same reasoning applied, and that words of mere agreement were words of lease." The effect of holding an unsealed instrument, which should have been under seal, to be intended as a present demise, and not as an agreement, is that it is void at law under this Act. whereas, by construing it as an agreement, it is good as such.

The question as to whether a transaction is a present demise or a mere agreement, will be less frequent since this Act. as an instrument intended as an agreement for a lease exceeding three years, can never take effect as a present lease if not under seal; but still on an instrument relating an interest not required to be created in writing, the **Question** often arises; as also where the interest is for more Or less than three years, and the instrument is by deed; both of which cases, as regards the question, are untouched by this Act. It is conceived that in such cases the decisions on the question under the Statute of Frauds are still applicable as to the construction, subject however to this. viz., that the Courts will, since this Act, frequently construe that as a mere agreement which, before the Act. would have been construed as intended as an actual demise, on the principles laid down by Bramwell, B., as above.

If a lease is void as such under this Act, yet if the lessee Entry under enter and pay rent, with reference to the lease or some yearly void lease and holding generally and not merely de die in diem as tenant payment of rent, may creat will, or if with reference to a new fixed period, or under ate tenancy circumstances which negative the idea of a tenancy at will from year to (a), a tenancy from year to year is thereby created (b); the terms of

<sup>(</sup>a) Per Parke, B., in Braythwayte v. Hitchcock, 10 M. & W. 497; Richardson v. Langridge, 4 Taun. 128; Tud. Lg. Ca. 21, and cases quoted; Clayton v. Blakey, 2 Sm. Lg. Ca. 104; McInnes v. Stinson, 8 U. C. C. P. (b) Ib.

the void lease and it would seem that so far as applicable the terms and will be incorprovisions of the intended lease will govern (a). porated.

Though void fic performance may be had.

Though the instrument be void at law as a lease, ye at law, speci-specific performance may be enforced, treating it as a agreement for a lease (b): and even at law, where a instrument not under seal might have operated as a actual demise but for the Statute, which makes it void, ve if it contain an agreement for a grant of a regular less such agreement is binding and an action may be mair tained (c).

Anthority to agent under St. of Frauds.

It will be observed that under section 4 which refers agreements, no estate passing, the authority to the agemay be by parol; but under sections 1 and 3, which pr vide for cases where the estate is intended to be actual created or transferred, the authority must be in writing.

most it now be by deed?

The Consolidated Statute having enjoined sealing in cases under section 1, (unless within section 2), and in cases of assignments or surrender in deed within section (unless the interests assigned or surrendered might has been created without writing), the question arises whether the authority to the agent must not in such cases also I under seal: it has been laid down in a work of some at thority that it must be by deed (d).

If a deed be delivered is sizning requisite under Statute of Francis?

There is much authority that if, where requisite, a dee be delivered, the Statute of Frauds need not be complied with as to signature (e). At Common Law signature w not requisite, even in cases where sealing was (f); and explained in treating of section 2, up to the time of the Statute of Frauds estates in possession could be created

<sup>(</sup>a) Smith Ld. and Tenant, note p. 79; Richardson v. Langridge, Ti Lg. Ca. 21, in notes, cases cited; Thomas v. Packer, 1 H. & N. 66 Pistor v. Cater, 9 M. & W. 315; Tress v. Savage, 4 E. & B. 36; Lee Smith, 9 Ex. 663.

<sup>(</sup>b) Parker v. Taswell, 2 DeG, & J. 559.

<sup>(</sup>c) Bond v. Rosling, 30 L. J. N. S. Q. B. 227: 1 B. & S. 371.

<sup>(</sup>d) Addison Contracts, 4th ed. 46.

<sup>(</sup>a) Aveline v. Whisson, 4 M. & G. 801; Cherry v. Heming, 4 F. 631; Addison Contracts, 4th ed. 4; Prest. Shepp. Touch., 56; Tupy v. Foulkes, 9 C. B. N. S. 797, arguendo.

<sup>(</sup>f) Black Com. vol. 2. 396.

transferred without deed or writing of any kind. remedy this, the Statute of Frauds was passed, but as remarked by Rolph, B. (a), "The object of the Statute was to prevent matters of importance from resting on the frail testimony of memory alone, it was not intended to touch those instruments which were already authenticated by a ceremony of a higher nature than a signature or mark." This construction does no violence to the language of the Statute: thus, a lease for years, or a freehold estate created by deed without signature is not "made or created by livery of seisin only, or by parol" in the language of section 1: and as to the transfer of existing estates under section 3. the word signed may be referred to the words note in writing only.

It would seem that to the validity of a deed not only is Attestation no attesting witness necessary, but no person need have and witness. been present to witness the delivery: thus, in covenant in tight to a deed. an indenture said to have been between defendants and plaintiff, it appeared that all parties had executed except the defendant Heming, and the deed was produced out of his custody. There was, however, a seal affixed for each party, and the defendant had written to the plaintiff, referring particularly to the indenture, and describing it as made by the various parties, including himself; this was held sufficient evidence to go to the jury of sealing and delivery by him (b). There is also a class of cases where no evidence is capable of being given of execution of a deed by a party to a suit, except by calling him as a witness, and where the attesting witness cannot be called as being a party to the record: thus, in one case the defendant in dower had witnessed the execution by demandant, as a markswoman, of a conveyance to one from whom the defen-Pant afterwards purchased; the conveyance contained a release of dower; it was considered that proof of the defendant's signature as a witness was inadmissible (c).

<sup>(</sup>a) Cherry v. Heming, 4 Ex. 631

<sup>(</sup>b) Cherry v. Heming, 4 Ex. 631; see also Clark v. Stevenson, infra, C. L. P. Act, section 212.

<sup>(</sup>C) Clark v. Stevenson, 23 Q. B. U. C. 525, Hagarty, J., diss.

One seal may parties.

Where one of two partners signed in the name of both suffice for two in presence of the other, and for him and with his asser & though there was but one seal, it was held the deed of both; the deed, however, did not relate to lands, but appear rently to a matter of partnership business (a).

Assignment,

An assignment is properly a transfer of one's whole interest in any estate (b); but it is usually applied to a estate for years, or equitable interests.

of whole eshas been construed as a lease.

A transfer of the whole interest in a term, has been contate in a term strued as a lease, and not as an assignment, rent having been reserved to the assignor, the intention having been to create the relation of landlord and tenant, and the transaction being valid, if regarded as a lease, but void if regarded as an assignment, as not being in writing (c). Lord Denman, C. J., observed "If we were to decide that the transaction was an assignment, we should at the same time decide that it was no assignment, being by parol only, and we should construe that which was expressed to be a lease, to be an assignment only ut res pereat, which is against a known salutary maxim."

As an assignment operates on the whole interest, it is said it cannot be made of a term to take effect in futuro (d).

All assignments must be in writing, rests that could not be created without writing, then by deed, Authority to agent be by , décd, if the assignment be by deed.

The necessity, by reason of section 3 of Statute of Frauds. of all assignments being in writing and signed by the asand if of inte-signor or his agents, or by deed, was before explained (e); as also the necessity of a deed in all cases where the interest assigned is such as could not be created without writing (f): and also the question as to whether if the assignment must be by deed, this Act does not superadd the necessity of a seal to the authority to an agent transferring, which by the Statute of Frauds, need only be in writing (q)-

<sup>(</sup>a) Moore v. Boyd, 15 C. P. U. C. 513; see also Ball v. Dunsterville 🕳 4 T. R. 313.

<sup>(</sup>b) Watk. Conv. 9th ed. 343; Watt v. Feader, 12 C. P. U. C. 254.

<sup>(</sup>c) Pollock v. Stacy, 9 Q. B. 1035; see also Cottee v. Richardson, Ex. 143; but see Barrett v. Rolph, 14 M. & W. 348, contra.

<sup>(</sup>d) Watk. Conv. 9th ed. 343 note; Smith Rl. Prop. 3rd ed. 710.

<sup>(</sup>e) p. 58.

<sup>(</sup>f) p. 58.

<sup>(</sup>g) p. 60.

before explained also, no signature may be required the assignment be by deed.

A surrender (a) is the yielding up or returning of a Surrender.

Smaller estate, to him who has a greater estate in remainder or reversion immediately expectant on such smaller estate.

Surrenders are of two kinds, express or in deed, and implied or in law.

At Common Law, (except as to things which lay only in at Common grant, such as incorporeal hereditaments), a surrender was Law. good by parol, and though of a freehold estate, might have been without livery of seisin, by reason of the privity of estate necessarily existing between the parties.

The necessity, by reason of the Statute of Frauds, of all All surrensurenders (except those by operation of law) being by ders except by act of law deed or note in writing was before explained (p. 58); as must be in also the necessity of a deed, by reason of this Act, in all writing. Cases where the interest surrendered is such as could not If of an interest bare been created without writing (p. 58); and also the rest that required to be created in der to be by deed, it does not practically superadd to the writing, then must be by Statute of Frauds the necessity of the authority to an agent deed.

Executing the surrender, being also by deed (p. 60).

Authority to

No surrender of an estate, either in deed or in law, takes the agent must be by place by mere cancellation or destruction of the instrument deed, if the creating the estate (b); but it is a circumstance which, surrender is with others, will aid the *implication* of a surrender (c).

Surrenders in law are expressly excepted from the Surrenders Statute of Frauds, and are not within this Act, which in law. speaks of surrenders in writing (d); they are sometimes of a nature to give rise to questions of great difficulty. These

 <sup>(</sup>a) As to surrenders, see Smith Rl. Prop. 3 ed. 700; Watk. Conv. 9 ed. 339; 2 Black. 326; 2 Smith, Lg. Ca. 5 ed. 713; 6 ed. 759.

<sup>(</sup>b) Lord Ward v. Lumley, 5 H. & N. 87; see also Fraser v. Fralick, 2l Q. B. U. C. 346; Fraser v. Fraser, 14 C. P. U. C. 70; Laur v. White, 18 C. P. U. C. 99.

<sup>(</sup>c) Doe d. Burr v. Denison, 8 Q, B. U. C. 185.

<sup>(</sup>d) Lewis v. Brooks, 8 Q. B. U. C. 576.

surrenders have been referred to the doctrine of est in pais (a). The term surrender by operation of law said by Parke, B. (b), to be properly applied to cases v some "act has been done by or to the owner particular estate, the validity of which he is estopped disputing, and which could not have been done if the ticular estate continued to exist. The law there says the act itself amounts to a surrender. In such case, i be observed, there can be no question of intention. surrender is not the result of intention; it takes independently, and even in spite of intention."

Acceptance

Parol agreement and change of possession.

Defence to subsequent rent,

not prior rent, except by way of equitable defence.

The acceptance of a new lease, though for a less r of new lease. than the existing term, is a surrender of the term, pro such an estate pass by the new lease as was contemp by the parties at the time (c). So also a parol agree between landlord and tenant, that the tenancy should and the landlord re-enter, acted on by re-entry and tenant quitting, is a good surrender in law (d); but must be change of possession (e); though even wi such change, and irrespective of validity of surrender agreement acted on by the tenant might operate as fence to an action for subsequent rent (f). Rent due pric surrender is not thereby discharged (q); but acceptar a promissory note, and a surrender by way of new con and in part performance, was held good by way of equ defence to a bond to the plaintiff securing payment of of the premises surrendered, overdue at the time, th

<sup>(</sup>a) Doe v. Oliver, 2 Sm. Lg. Ca. 5 ed. 713; Doe d. Burr v. Den Q. B. U. C. 185.

<sup>(</sup>b) Lyon v. Reed, 13 M. & W. 285.

<sup>(</sup>c) Doe d. Biddulph v. Poole, 11 Q. B. 713; Roe v. Archbia York, 6 East, 86.

<sup>(</sup>d) Grimman v. Legge, 8 B. & C. 324; Dodd v. Acklom, 7 Sc. 415; but see Morrison v. Chadwick, 7 C. B. 266.

<sup>(</sup>e) Johnstone v. Huddlestone, 4 B. & C. 922; Mollett v. Bra Camp. 103; Carpenter v. Hall, 16 C. P. U. C. 90.

<sup>(</sup>f) Gore v. Wright, 8 A. & E. 118.

<sup>(</sup>g) Attorney General v. Cox, 3 H. L. C. 240; Bradfield v. He 16 C. P. U. C. 298.

such acceptance would have been no valid defence at law for the overdue rent (a).

## SECTION 5.

A contingent, an executory, and a future interest, and a possi- Contingent bility coupled with an interest in any land, whether the object of interests may the gift or limitation of such interest or possibility be or be not by deed. ascertained, also a right of entry, whether immediate or future, and whether vested or contingent into or upon any land, may be disposed of by deed, but no such disposition shall by force only of this Act, defeat or enlarge an estate tail, and any such disposition by a married woman shall be made conformably to the provisions of the Act enabling married women to convey their real estate, 14, 15 V. c. 7, s. 5.

# SECTION 11.

Any estate, right, title or interest in lands which, under the Any interest fifth section of this Act, may be conveyed or assigned by any party, in lands which shall be bound by the judgments of any Court of Record, and might be conveyed under shall be liable to seizure and sale under execution against such this Act to be party, in like manner and on like conditions as lands are by law liable under bound by judgments and liable to seizure and sale under execution, and the Sheriff selling the same, may convey and assign the same to the purchaser in the same manner and with the same effect as the party might himself have done. 12 V. c. 71, s. 13 -14, 15 V. c. 7, s. 9.

Section 11 requires no remarks beyond those applying to section 5, and those made in reference to execution (b), except that by 24 Vic. ch. 41, sec. 8, section 11 of the 24 Vic. c. 41, Con. Stat. was repealed and re-enacted. The change made s. 8. is that part of the Con. Stat. which enacts that lands be bound by judgment is by the later Act to be omitted.

The Stat. 12 Vic. ch. 71 sec. 5, was in substance much the same as sec. 5 of 14 & 15 Vic. ch. 7, which repealed it; the former, however, applied only to rights of entry for condition broken, whilst the latter applies to rights of entry,

(b) Post, title Execution.

<sup>(</sup>a) Bradfield v. Hopkins, supra; see Webb v. Hewitt, 3 K. & J. 438.

an important difference as hereafter explained: the for Statute also applied to personal property, whilst the la does not.

Con. St. c.90. s. 5, as to contingent

The Statute 14 and 15 Vic., Con. Stat. ch. 90, sec. 5 taken from the Imp. Stat. 8 & 9 Vic. ch. 106. interests, &c., Imperial Act and the Provincial Act of 14 & 15 Vic. v designedly retrospective in their operation, that is, con gent interests created and existing before the passing those Acts were made assignable, but, as hereafter explain the Con. Stat. by sec. 12 varies this (a).

> As many titles depend on the question of the valid (or rather the invalidity), of conveyances of conting interests and rights of entry before the Statute, it may advisable to define shortly their nature, how they stood Common Law, and the further statutory enactments regards their devisable quality, especially as the Act d not apply to mere naked possibilities, or to mere rights action as distinguished from rights of entry, or to right entry for conditions broken, or to chattels not being chat real, or to devises.

does not apply to mere possibilities. rights of action, rights of entry for condition broken, chattels or devises.

Distinctions between the various interests.

Interests exeture may be contingent, or vested. or neither.

The distinctions between contingent, executory future interests, and possibilities coupled with an inter are sometimes exceedingly refined and subtle (b): it said by Lord Ellenborough that it is far easier to insta what they are not, than to define what they are (c). they are now all capable of being conveyed under Statute, it is not proposed to point out all the distinct between them. It may be mentioned, however, that cutory and fu- contingent interests are necessarily executory and fut but all executory or future interests are not necessa contingent, but may be vested in point of estate, or, & Mr. Preston (d), neither vested nor contingent.

<sup>(</sup>a) See remarks as to sec. 12, pp. 85, 86.

<sup>(</sup>b) 1 Prest. Est.; Fearne Cont. Remrs. by Butler and app. the on Executory Interests, by Smith; notes to Hanson v. Graham, Tud.

<sup>(</sup>c) Doe v. Tomkinson, 2 M. & S. 170.

<sup>(</sup>d) 1 Prest. Est. p. 63; Titles, 2 ed. p. 118.

An executory or future interest, neither vested or con-When future tingent, may arise by executory devise, or on a springing or and executory interests are shifting use, dependent on no contingent or uncertain event, neither vested but on one that certainly must happen, as on a limitation nor continto B and his heirs to the use of C and his heirs on the death of A. &c. The interest is not contingent, because it does not depend on a contingency, as would be the case if the event named were the return of A from Rome, which possibly never might occur: on the other hand the interest is not vested, for it is not present, so as to be assignable at Common Law (a).

An interest may be executory and future as regards time when vested. of enjoyment and of possession, and yet vested in point of estate (b). Of this an instance is afforded by a vested remainder in B dependent on a life estate in A.

The Statute relates not to these latter interests, which are To what fupresently executed and vested as regards estate, dependent ture interests or no contingency, and merely executory as regards time lates. of enjoyment; for such were alienable at Common Law. It relates to interests executory and future in all respects, not only as to time of enjoyment, but also of vesting in estate, which time may be fixed and certain, or contingent and uncertain: and in this sense only they are spoken of hereafter.

Strictly speaking there cannot be a contingent estate; there may be a contingent interest; but no interest except such as is vested, is accurately termed an estate (c).

Possibilities are interests at the same time executory, Possibilities. future and contingent.

As a mere naked possibility stands yet, as at Common Law. unassignable at law at least, it is requisite to point out the distinction between such a possibility, and that affected by the Statute, viz., a possibility coupled with an

<sup>(</sup>a) See last note; also Jones on Uses, pp. 60, 67.

<sup>(6)</sup> See as to the vesting of estates under Wills, Jarman on Wills, and hotes to Hanson v. Graham, Tud. Lg. Cases.

<sup>(</sup>c) Prest. Abs. 2 ed. p. 92.

interest, of which the object may or may not be ascertained.

It is not easy sometimes to define the various classes of possibilities, especially as some writers class those coupled with an interest where the object is not ascertained, under the head of *mere* possibilities; or deny that the possibility is coupled with an interest when the object is not ascertained, as is the case of a devise to the survivor of two living persons.

Mere naked possibilities —instances.

Of mere or naked possibilities, not coupled with and interest, instances are afforded by the expectancy of an heir-at-law to succeed to the estate of his ancestor; of a person to take under the will of another then living, and under a power of appointment that may or may not be exercised in his favor (a).

Coupled with an interest whose object not fixed instances.

Possibilities coupled with an interest where the object not fixed or ascertained, may, for the purposes of the Statute at least, be illustrated by the cases of gifts to take effect in favor of the survivor of several persons; to chi dren who shall attain twenty-one; to children who may living on the death of their surviving parent, or the like-e contingency. These possibilities have been said not to contingent interests (b), or coupled with an interest, by to be mere possibilities (c); and if this be so, then there instances above put are not within the Statute, and suc= h interests not assignable at law. It is ventured to submin to however, that such cases are within the Act, and for the purposes of the Act at least, to be considered as beyond me As regards the existence of a possibili possibilities. coupled with an interest when the object is not ascertai ed, Mr. Preston says, "a contingent interest gives a me possibility; a possibility which is coupled with an interest when the person is fixed: mere possibilities to persons  $\mathbf{p} \bullet^t$ 

<sup>(</sup>a) 2 White & Tu. Lg. Ca. Eq. 2nd ed. p. 652; Shelford Stat. 2 2h ed. 345.

<sup>(</sup>b) Per Lord Ellenborough, C. J., Doe v. Tomkinson, 2 M. & S. L. Z. C. (c) Preston Estates, vol. 1, pp. 75, 76; see also Watkins Conv. 9th. title Possibility, note.

ascertained, as to the survivor of several—are not coupled with an interest." At the the time he wrote, this definition answered every purpose; but since then the Act has alluded in express terms to a possibility where the object is not ascertained, and vet coupled with an interest, a new species of possibility not contemplated by Mr. Preston, or rather denied by him as capable of existing, and classed as a mere possibility.

Mere naked possibilities, as above defined, not coupled Naked possiwith any interest, would alone appear to be excluded from within the the Act (a); and it is apprehended that though before the act. Act a devise to the survivor of two living persons might be termed a possibility not coupled with interest, yet it is not 80 now for the purposes of the Act. It would be difficult to suggest any cases answering the language of the Act, of possibilities coupled with an interest where the object is not fixed, if the above instances do not.

Possibilities coupled with an interest where the object is Possibilities fixed, but the event is uncertain whereupon such object is coupled with to take, may be exemplified by many cases of contingent re- where object mainders, or limitations by way of executory devise, or spring- is fixed, but ing or shifting use, in favor of ascertained persons, the which, uncertain. however, are not to take effect or become vested estates till the happening of some named event, which by possibility never may happen (b); as on a limitation by executory Instances. devise or shifting use to A, and on the return of B from Rome, then to the use of C.

The inchoate right to dower of a woman whose husband Dower. is alive is a possibility which is within the Act (c); and may be sued for in the name of the assignee (post, Dower).

<sup>(</sup>a) 2 White and Tud. Lg. Ca. Eq. 2nd ed. 654; 3rd ed. 708.

<sup>(</sup>b) See Watkins Con., title Possibility, note.

<sup>(</sup>b) See Watkins Con., title Possibility, note.

(c) Miller v. Wiley, 16 C. P. U. C. 529; 17 C. P. U. C. 368, s. c.

In this case, unfortunately, the case of McAnnany v. Turnbull, 10

Grant, 298, was not referred to; it is distinguishable from that case in

this, that in the latter case the husband was dead at the time of the assignment of the dower, whilst in the former he was not. In some respects

Miller v. Wiley upholds the case in equity, for the Court said "it may

therefore be that a demand for dower, which has been transferred after

Aer husband's death, though brought in the name of the woman, as it

whilst on the other hand if the husband were dead, so that the element of contingency is removed as regards the right in point of interest, and the interest becomes vested, giving a present certain right of action, the case is not within the Act (a), and the assignment is recognized only in equity (b)

Husband's interest in lands of the wife.

At Common Law the husband, before birth of issue, caconvey only for the joint lives of himself and his wife, am could not convey his possibility of becoming tenant by the curtesy, but after birth of issue capable of inheriting and a seisin of the wife, he could convey for his own life his inchost right as tenant by the curtesy initiate (c); and such right as regards alienation needs not the aid of this Act, and

probably must be, is brought for the benefit of the assignee." Now the recognizes that such a transfer is not within the Act, for if it were, the the action must be brought, not in the name of the woman, but of he

assignee, see post p. 76.

On the other hand, the case at law conflicts with that in equity in this that the Court stated (p. 542) "since the Con. Stat. ch. 90, we are incline to think that a woman may before assignment of dower convey her clair to it to any person, for it is an interest, though not an estate in land, are so we think within the Statute." Now considering that the Court, just prior to the above words, was referring to the case of a widow's conveying, it would seem that by those words they also referred to the same case, and intimated that a widow may convey by force of the Act, which conflicts with the prior decision in equity. It is manifest that the Court was in those words referring to the case of a widow, for supposition the contrary would conflict with what is subsequently laid down (p. 543), where the Court, after referring to the fact that it was a case of release to a purchaser in the husband's life time, said "if it turn out that the alleged purchaser was a mere assignee of her inchoate right of dowers she will succeed, because the assignee will not have been a purchase but a mere stranger to the land, and as such a right would not pass she may well say she did not in law release her dower, as alleged.' It is submitted that the assignee of a married woman of her inchoat right might take by force of the Act, by an assignment executed with the proper formalities, and that the right would pass by assignment; that sue inchoate right is at least a possibility coupled with an interest within the Act, and that if the right does pass, the assignee can sue in his own nam (post p. 76): also that the case of an assignment by a widow is not within the Act; and though valid as a mere contract in equity, is not valid s law to pass any interest, and the assignee cannot sue in his own name. I is to be remarked that in Miller v. Wiley, the Court stated, (p. 534 "it is not necessary to express any opinion on this question."

- (a) McAnnany v. Turnbull, 10 Grant, 298; see, however, the observations in the previous note.
  - (b) Rose v. Simmerman, 3 Grant, 598; post p. 257.
- (c) Smith Rl. Prop. 3 ed. 186; Moffatt v. Grover, 4 C. P. U. C. 402 Watk. Conv. 3 ed., by Preston, p. 54; see further as to the husband's rights, the remarks on Con. Stat. ch. 73.

not within it (a). Before seisin, as in case the wife's estate should be in remainder dependent on a life-estate (in which case the seisin of the freehold is in the life tenant). as also before birth of issue, the husband, so far as relates to his interest as tenant by the curtesy, as distinct from his marital right to the pernancy of the profits during the joint lives of himself and wife, has a contingent interest, which it is submitted is within this Act, and therefore alienable by his conveyance, or on execution against him (b), unless in the latter case it is controlled by Con. Stat. ch. 73, sec. 13 (c). Such interest would seem to stand as regards its alienable qualities by force of this Act on at least as high a footing as a wife's inchoate right to dower during the life of her husband, which is within the Act (d).

Possibilities coupled with an interest whereon the con-Possibilities tingency exists in the event, and not in the object, are in with an interfact contingent and executory interests, and governed by est dependthe same rules in respect of their alienable and other quali-tainty of ties as hereafter mentioned in regard to contingent interdevisable, &c. ests. When, however, the object is not fixed, as in the instances above given, they were wanting in the qualities were unascerof such interests, in that they could not even be released, tained, not (e) or devised under the Statutes of Wills of Henry (f), releasable or devisable, and it may be doubtful whether they are now devisable.

Bare possibilities as above defined are not within the And the same Act, and stand yet on the same footing as those coupled as to bare with an interest where the object was not fixed occupied possibilities. before the Act. Though incapable of being aliened at law. an assignment for value is enforceable in equity (g).

<sup>(</sup>a) See Emrick v. Sullivan, 25 Q. B. U. C. 107, per Draper, C. J.

<sup>(</sup>b) See Moffatt v. Grover, 4 C. P. U. C. 402, per McLean, J., that after birth of issue the husband's interest as tenant by the curtesy intiate could be sold at Common Law. (c) See observations on that Act.

<sup>(</sup>d) Ante, p. 69. (e) Smith Rl. Prop. 3 ed. 692.

<sup>(</sup>f) Smith Rl. Prop. 3 ed. 951; Doe v. Tomkinson, 2 Mau. & S. 165; see the principle discussed, 1 Jar. Wills, 2 ed. 37.

<sup>(8)</sup> Lyde v. Mynn, 1 My. & Keen, 683; Pope v. Whitcombe, 3 Russ. 124; Wethered v. Wethered, 2 Sim. 183; see Harwood v. Tooke, 2 Sim. 193; Alexander v. Wellington, 2 Russ. & M. 55; Carleton v. Leighton. 3 Mer. 667; see also 2 W. & T. Lg. Ca. 2 ed., 654, 610.

Rights of entry.

The interests which have been alluded to confer manifestly no immediate right of entry, and this right is to be distinguished from a mere right of action, which is not within the Act. A right of entry confers a right of action. but a right of action to recover lands does not necessarily

action.

distinguished confer a right of entry. A right of entry exists in all cases from rights of of abatement, intrusion, or disseisein (a), and simultaneously with that a right of action; formerly the right of entry might have been tolled by descent cast, discontinuance, or warranty, in which case a right of action alone was left: so also in cases of deforcements (b), (not comprising cases of abatement, intrusion or disseisin, and the case of overholding tenants,) no right of entry, but a mere right of action exists. The claim for dower withheld is a familiar instance of the existence of a right of action without a right of entry; so also the right to avoid a conveyance on equitable grounds.

Rights of entry distinguished from rights of ention broken. What rights of entry are within the act

Rights of entry are further to be subdivided for the purposes at least of this Statute, into rights of entry for condition broken, which alone were included in the former try for condinact of 12 Vic. c. 71, and are not expressly referred to nor seem to be within this Act, which, it is said (c), relates to rights of entry as on "a disseisin, or where a party has a right to recover lands, and his right of entry, and nothing but that remains."

Rights for condition broken.

Rights of entry for condition broken were never favored in law, which has always leaned strongly against forfeitures, and moreover, in the most frequent instances wherein they occur, viz., on leases, the Stat. 32, H. 8, c. 34, has afforded a remedy to assignees, for breach during their estate, and enables them to take by assignment right to enter for future breaches of covenants tending to the maintenance of the reversionary estate, or as to rent (d), but it gives no present right to enter for breaches prior to the assignment.

(d) Sugden Vendors, 13 ed. ch. 15, s. 1.

<sup>(</sup>a) Black. Com. vol. 3, p. 168; by Leith, p. 197. (b) See note a supra-(c) Hunt v. Bishop, 8 Ex. 675; Hunt v. Remnant, 9 Ex. 635; see also Bennett v. Herring, 3 C. B. N. S. 370.

It should be observed, however, that the decisions on this Act do not go the extent of determining that a future right of entry for a future breach of condition may not pass by assignment, though there are obiter dicta that it will not. In the cases decided, the breach giving right to enter existed at the time of the assignment. The words of the Act are large enough to include a future right on a future breach. The question is important, because the Act of Henry does not extend to covenants and conditions collateral to the land; as to pay a sum of money in gross.

Rights of entry as on a disseisin were not assignable at Rights of Common Law: the simplicity of the Common Law enjoined entry not asthat every man should assert his own right of entry or of common law. action, and not assign it to strangers, which savored of maintenance. Lord Coke says (a): "The great wisdom and policy of the sages and founders of our law have provided that no possibility, right, title, 'or thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice." To this rule the King was always an exception (b). Any conveyance by a person disseised to a stranger was void (c), but the right might be released to the terretenant or person in possession claiming title.

There were cases, however, wherein, even though the Exceptions. possession of the possessor were adverse to the owner, he would not be deemed disseised so as to preclude him from conveying; as in the case of a tenant holding over after expiry of his term, or of a purchaser under a contract let into possession, after default in payment; or in the case of a person claiming possession adversely, between whom and the owner there was that privity and those circumstances.

<sup>(</sup>a) 10 Co. 48a. (b) Doe Fitzgerald v. Finn, 1 Q. B. U. C. 70.
(c) Doe v. Scratch, 5 U. C. Q. B. 351; Doe v. Molloy, 6 U. C. Q. B. 352

that the right of the owner could not be denied by s person (a).

32 H. VIII. of rights of entry.

In affirmance of Common Law principles, by the S c. 9, as to sale 32 H. 8, c. 9, penalties were imposed on both the se and the buyer (having knowledge of the facts) of the ri whether real or false, of a person disseised for more than vear before sale (b). This Act is virtually repealed by Con. Stat., at least where an actual legal right of er does exist, as in the case of the true owner being dissei and where it is not the case of a mere pretended ri which the claimant himself could not enforce (c).

Rights of entry not devisable.

The owner whilst disseised could not, at Common l or under the Stat. of Henry, devise (d), but there w circumstances under which mere adverse possession we not prevent a devise being valid (e). This Statute of not apply to devises, and it does not seem to be quite c that a person disseised has now any greater power to de than at Common Law (f).

Rights of action not assignable at or now,

Rights of action were not assignable at law, on the s rules that prohibited assignments of rights of entry: common law, are such rights, not partaking of the nature of rights entry, but being mere rights, unaccompanied by a righ entry (g), as in the instance above given of a deforcem by non-performance of a contract to convey a freel estate, or the withholding from a widow of her pres existing right to assignment of dower (h), now assigna as not being within the Act. It follows also that they not, by force of the Act, saleable under execution. T may, however, be released to the terre-tenant (i).

may be released.

<sup>(</sup>a) Bishop of Toronto v. Cantwell, 12 C. P. U. C. 610, per Draper, C Benns, q. t. v. Eddie, 2 Q. B. U. C. 286; see also 1 Jarman on Will ed. 44.

<sup>(</sup>b) Beasley v. Cahill, 2 U. C. Q. B. 320; Baldwin v. Henderson, 2 C. Q. B. 388; Doe d. Williams v. Evans, 1 C. B. 717.

<sup>(</sup>c) Baby, q. t. v. Watson, 13 Q. B. U. C. 531.

<sup>(</sup>d) Jarman Wills, 3 ed. 43.

<sup>(</sup>e) Supra, as to conveyances by disseisee; Doe v. Hull, 2 D. & By. Culley v. Doe, 11 A. & E. 1021. (f) See Con. Stat. c. 82, s. 1 (g) See ante, p. 72. (h) McAnnany v. Turnbull, 10 Grant, 2

<sup>(</sup>i) Co. Litt. 265a, note 1; Miller v. Wiley, 16 C. P. U. C. 538.

In equity, assignments of these rights for valuable consid-Validity of eration are recognized and enforced (a); unless contrary to assignment public policy, or partaking of champerty or maintenance, in equity. as in the case of purchase of a bare right to file a bill to set aside a conveyance for a fraud on the assignor (b); but if Champerty. the right to file such a bill is a mere incident to the transaction, and the property which was the subject matter of the fraud is also conveyed, such conveyance is valid even though voluntary (c).

A right of action unaccompanied by a right of entry, as Devisable in the instances above given, is devisable as in the nature qualities of of an equitable interest (d); but a reversion in fee expectant on an estate tail which had been discontinued by the tenant in tail could not be devised (e), nor if expectant on a life estate, and the life tenant had levied a fine (f). The devisable quality of rights of action, which partake in their nature of rights of entry, are elsewhere treated of (g).

Contingent executory and future interests within this Contingent Act were not assignable at Common Law to strangers, but assignable at might, unless the object were unascertained, always be releasat law, ed to a terre-tenant, or person having a sufficient estate or inmight be terest by right or by wrong (h). Such releases were allowed as released. tending to preserve unimpaired, subsisting vested estates (i). The reason (k) why contingent and executory interests were inalienable is, that originally, in the early state of the feudal system, property was inalienable, and though in process of time, by custom, and the effect of the Stat. Quia Emptores, lands and estates in them became alienable;

<sup>(</sup>a) Row v. Dawson, Ryall v. Rowles, 2 W. & T. Lg. Ca. Eq., 2d ed. 612, 652.

<sup>(</sup>b) Cases last note, pp. 679, 681; Smith Rl. and Per. Prop. 2d ed. 787; Prosser v. Edmonds, 1 Y. & C. Ex. 481; Dickinson v. Burrell, L. R. 1 Eq. 337; DeHoghton v. Money, L. R. 2 Cha. App. 164; Muchall v. Banka, 10 Gr. 25. (c) Dickinson v. Burrell, L. R. 1 Eq. 337.

<sup>(</sup>d) Stump v. Gaby, 2 D. M. & G. 623; Gresley v. Mouseley, 4 D. & J. 78; Dickinson v. Burrell, supra.

<sup>(</sup>e) 1 Jarman Wills. 3 ed. 43.

<sup>(</sup>f) 6 Cruise Ten. 38, c. 3, s. 30.

<sup>(</sup>g) See p. 74.

<sup>(</sup>h) Smith Rl. Prop. 3 ed. 692, 829.

<sup>(</sup>i) Wms. Rl. Prop. 5 ed. 240.

<sup>(</sup>k) Wms. Rl. Prop. 5 ed. 241.

still this did not extend to those interests which confectate (a), and they remained always as they origin were, for the reasons assigned by Lord Coke, as above a tioned. The true mode of explaining our laws is no start with the notion that all estates and interests always alienable at pleasure, and then endeavor to a why certain kinds are not alienable, but to proceed or converse principle.

Bound by estoppel.

These interests might, however, have been bound at by estoppel, on a fine, or recovery, or it would seem on an indenture (b).

Assignments recognized in equity.

The assignment of these interests for valuable consiction was recognized and enforced in equity: the assement of a contingent interest could not, before the States as presently explained, operate as a present conveyance that on the happening of the contingency and consequesting of the estate it would vest in the assignee and in the assignor, but the assignment was regarded in east a contract by the assignor to assign the estate who should vest (c), and then to perfect the matter by a sufficence value of such estate.

Since the act, equity need not be resorted to except as to bare possibilities and contingencies in personalty. Effect and operation of the act on assignments.

Since the Statute the jurisdiction of a Court of Exwill not require to be invoked as to the interests a referred to, though it will still be requisite as to casbare possibilities and contingencies as to personalty.

The effect and operation of the Act may be thus she Before the Act, when a contingent or other execuinterest took effect on the happening of the event, cethe ascertaining of the object, and so became a vestate, such estate, notwithstanding prior assignment the former interest while contingent, nevertheless venot in the assignee but in the assignor, or party to be lifted by the original limitation; the consequence was to perfect the assignment and vest the estate in the signee, a conveyance thereof to him was requisite;

<sup>(</sup>a) Ante, p. 67.

<sup>(</sup>b) Smith Rl. Prop. 3 ed. 829; Shelford Stat. 7 ed. 345, 346,

<sup>(</sup>c) Story's Eq. Jur. s. 1040 b.

as above explained, a Court of Equity would enforce the giving such conveyance (a). Thus, take the simple case of land granted to A for life, and in case B survived him. then to B in fee; here is a remainder contingent on the happening of an uncertain event. If B in the lifetime of A should assign his contingent interest to C and survive 4. the estate in fee would vest in B, for the law in no wav recognized the assignment. Since the Act, however, it is apprehended the effect of the assignment would be to substitute C for B, and consequently that the estate would vest and become executed in C.

Contingent and executory interests were devisable under Contingent the Statute of Wills of Henry VIII. (b), but as before ex-interests deplained in treating of devises of possibilities, if the object were unascertained at the time of devise, the devise would not take effect.

No disposition by force only of the Act is to defeat or Act does not enlarge an estate tail. By Con. Stat. c. 83, sec. 4, every apply to estates tail. actual tenant in tail, in possession, contingency or otherwise, may dispose of, for an estate in fee simple absolute, or Conveyance less estate, the lands entailed, as against all claiming by heir in tail. force of an estate tail vested in, or which might be claimed by, the person making the disposition. By sec. 1 the expression "actual tenant in tail" means exclusively the tenant of an estate tail which has not been barred. Sec. 9 enacts that nothing in the Act shall enable any person to dispose of any lands entailed, in respect of any expectant interest which he may have as issue inheritable to any estate therein. The expectant heir in tail therefore cannot by force of ch. 83, defeat his own issue, or ulterior estates. and as fines, recoveries and warranties are abolished, it would seem that his power would extend only to his own life interest, and that his conveyance could be valid only in equity as a contract (c). As a contract it would seem

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<sup>(</sup>a) 1 Prest. Abs. 2 ed. 98.

<sup>(</sup>b) 1 Jarman Wills, 43.

<sup>(</sup>c) Ante p. 76, 68, 69, 71. It is apprehended that the conveyance could not operate beyond a contract in equity, and would not be valid under this Act (ch. 90) to pass at law any life estate when the estate should vest in possion, as pointed out ante p. 76; and that this is so, notwithstanding the exception of the Act applies only to defeating or enlarging an estate tail.

it might be good notwithstanding Con. Stat. c. 83, s. 30, which only prevents the conveyance operating under the Act, but possibly leaves it good as a contract (a).

## SECTION 6.

Certain contingent remainders made valid. A contingent remainder, which existed at any time between the thirtieth day of May, one thousand eight hundred and forty-ning, and the second day of August, one thousand eight hundred and fifty-one, shall be deemed to have been capable of taking effect, notwithstanding the determination by forfeiture, surrender merger, of any preceding estate of freehold. 14, 15 V. c. 7, a.

Variance between this and the Imp. Act.

In England contingent remainders indestructible by destruction of the particular estate.

There is a most important variance between this sectio and the corresponding section of the Imperial Act. omission of two words in the 6th section of Provincial Ac of 14 and 15 Vic., which occur in the Imperial Act of and 9 Vic., and the language in which that section is consolidated cause the variance. In England no contingent remainder can be defeated but by expiry of the particular estate by efflux of time, or according to its original limitation, before the remainder can take effect, and thus in case of the most usual settlements, when life estates are giver to persons in esse, with immediate remainder to their own children unborn, there is no necessity for interposing trustees to support the contingent remainders. With us. contingent remainders, except those existing between 30th May, 1849, and 2nd August, 1851, are liable to be defeated according to the Common Law rules, by the determination by surrender, merger, or efflux of time, of the particula. estate before the remainder becomes vested.

Imp. Act 7 & By the Imperial Act 7 and 8 Vic. c. 76, s. 7, contingent 8 Vic. c. 76. remainders were annulled, and for them were substitute estates having the properties of executory devises, and the existing remainders were not to fail or be destroyed by the edestruction of the particular estate, unless destroyed by efflux of time, or the happening of the event on which was limited to determine.

<sup>(</sup>a) Sugden Stats. 2nd ed. 196; Pryce v. Bury, 2 Drew 11, which, however, was not the case of an expectant heir; and see s. 37 of c. 83.

The Provincial Act, 12 Vic., c. 71, was to the same effect. Prov. Act For reasons explained at length by Mr. Ker (a), the 12 Vic. c. 71. Imperial Act was deemed too wide, and by Imperial Act Imp. Act 8 & 8 and 9 Vic. c. 106, s. 1, the former Act was, as to con- 9 Vic. repeals former act tingent remainders, repealed retrospectively ab initio, and and re-enacts. by sec. 8 it was enacted that "a contingent remainder existing at any time after 1st December, 1844, (the time of operation of the former Act), shall be, and if created before the passing of this Act, shall be deemed to have been. capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened." This section re-constituted contingent remainders, rendered them indestructible therein mentioned, and prevented those, or the executory interests substituted in lieu thereof by the former Act, which owed their existence and validity to that Act. from being defeated by its retrospective repeal (b). The effect is also as above mentioned, that in most cases there is no necessity to interpose trustees to support contingent re-Tainders.

The Provincial Stat. 14 and 15 Vic., c. 7, repealed the Prov. Act 14 Former Act as to contingent remainders, but not retrospec- & 15 Vic. Lively, and it made by sec. 6 the same enactment as above, Imp. Act. contained in the Imperial Act, but omitted the words \*\* shall be." The construction placed on this by the Con. Con. Stat. Stat. is expressed by sec. 6 of that Statute; the dates varies from the statute; the statute is the statute of the statute is the statute of the statute of the statute is the statute of the statute of the statute is the statute of the statut therein referred to are taken from the Stat. 14 and 15 Vic., and are the dates of the passing of the two Provincial Acts. It would seem as though the Act of 14 & 15 Vic. should Erroneous have referred rather to the 31st December, 1849, than to reference in the 30th May, as the Act of 12 Vic., though passed on the & 15 Vic. as latter, did not come into operation (s. 14) till the former to its operaday, and the object of the Stat. 14 & 15 Vic. appears to tion. have been to provide for those contingent remainders which

the Act of 14

<sup>(</sup>a) See his letter in App.

<sup>(</sup>b) See Browell Statutes, p. 278 note r; Davidson Conv. vol. 3, 206.

on the faith of the operation of the repealed Act, had been created without estates to trustees to preserve them. Effect on s. 6 12 apparently conflicts somewhat as to these dates, for i of s. 12. enacts that the foregoing sections (including sec. 6) shall not apply to any estate, right, or interest created before the 1st January, 1850; as applied to contingent remainder sec. 12. (assuming it to conflict with sec. 6.) is nevertheles more strictly correct, and is in terms which, as above re marked, the Act of 14 & 15 Vic. should have been. remarks under sec. 12 as to the effect of Con. Stat. c. 1.

#### SECTION 7.

Effect of surin certain cases.

When the reversion expectant on a lease of any land merges render or mer- is surrendered, the estate which, for the time being, confers, ger of rever against the tenant under the same lease, the next vested right ant on a lease the same land shall, to the extent of and for preserving such inc dents to and obligations on the same reversion as, but for t surrender or merger thereof, would have subsisted, be deemed t reversion expectant on the same lease. 14, 15 V. c. 7, s. 7.

## SECTION 8.

The remedies and covenants in a lease not to be extinguished by the merger of the immediate reversion.

When the reversion of any land, expectant on a lease, E for the rent merged in any remainder or other reversion or estate, the pers entitled to the estate into which such reversion has merged, heirs, executors, administrators, successors and assigns, shall has and enjoy the like advantage, remedy and benefit against the I. see, his heirs, successors, executors, administrators and assign for non-payment of the rent, or for doing of waste or other for feiture, or for not performing conditions, covenants, or agreeme 1 contained and expressed in his lease, demise or grant, against 1 lessee, farmer or grantee, his heirs, successors, executors admiz trators and assigns, as the person who would, for the time beil have been entitled to the mesne reversion which has merge would or might have had and enjoyed if such reversion had 12 V. c. 71, s. 12. so merged.

S. 8 superfluous, overridden and enlarged by s. 7.

Section 8, taken from the Act 12 Vic., is superfluo In England the corresponding section was repealed by t Act 8 & 9 Vic., c. 106, which introduced a provision from which section 7 was copied in the Prov. Act of 14 &

Vic. Section 8 is not wide enough, it gives no reciprocity Defects in of benefit: it gives remedies against, but none to, the lessee, 8.8. &c. Again, it does not extend to the case of the estate, in which the reversion immediately expectant on the lease has merged, becoming itself merged. Thus if A seised in Case of desc fee have demised for life or for years to B, who sublets truction of to C, who sublets to D with a covenant to D to keep the the reversion on a lease at demised premises in repair; here, if whilst these estates Com. Law, are subsisting, C surrenders to B, his interest and the reversion expectant on the lease to D is destroyed (a). consequence at Common Law was that D was liable to Pay rent to no one, the reversion to which rent is incident being destroyed by act of the parties, and there is no privity of estate between any of them. On the other hand, there being no privity of estate, B would not be liable on the covenants of C contained in the lease to D. The same result followed if C should take a conveyance of the estate of B, and thus by the merger destroy his reversion on C's lease (b).

This was remedied by section 8, but, as stated above, only partially only partially: thus, in the case put B might recover the remedied by s. 8, which rent from D, but D could have no action against B on any gave no recibreach of the covenant made by C. So also, as stated procity, and above, if after the facts supposed, the estate of B had to a second become destroyed by surrender or merger, this section merger. would not have applied.

Sec. 7 clearly meets the above objection under sec. 8, of Complete rewant of reciprocity, and apparently also the other objection. The matter (in the case put above) would stand thus: on the surrender by C to B "of the reversion

expectant on a lease" to D, the estate of B is "to be deemed the reversion expectant on the same lease"; and when B surrenders to A, though B's estate may not be "the reversion expectant on a lease," referred to in the first

<sup>(</sup>a) Watk. Con. 9 ed. 56.

<sup>(</sup>b) Webb v. Russell, 3 T. R. 393; Wootley v. Gregory, 2 You. & J. 536; Burton v. Barclay, 7 Bing, 745; Thorn v. Woollcombe. 3 B. & 4d, 686; and see as to these sections, Laur v. White, 18 C. P. U. C. 99.

part of the section. (which means the immediate reversix formerly belonging to C.) yet it is still to be deemed the reversion expectant on the same lease for all purposa even for the purpose of causing the Act again to apply another merger of that (B's) reversion, and not merely the purposes of preserving the incidents and obligation on C's reversion

It has been said that the Act does not go far enough in not providing for cases of destruction of the reversion by other modes than by surrender or merger. (a).

Retrospective effect.

In England the enactment to which sec. 7 corresponds has been held retrospective (b); see however here the observations under sec 12.

The Act 4 G. forded a parsurrendered

Prior to secs. 7 & 8, a remedy was afforded, where leases II, c. 28, af were surrendered for the purpose of being renewed, by Stat. tial remedy in 4 Geo. 2, c. 28, sec. 6, the effect of which is that in such cases of leases case the new lease is valid to all intents as if the underto be renewed lease had been surrendered before the taking of the new lease; and the remedies of the lessees against their undertenants remain unaltered, and the chief landlord has the same remedy by distress and entry for the rents and duties reserved in the new lease, so far as they exceed not those in the former lease, as he would have had in case the former lease had continued (c).

## SECTION 10.

No implied warranty,&c., by the word

10. Neither the words "Grant" or "Exchange," in any deed, hall create any warranty or right of re-entry, or covenant by to be created implication, except in cases where by any Act in force in Upper grant" or Canada, it is declared that the word "Grant" shall have such "exchange." effect. 12 V. c. 7, s. 6.

A grant in fee

k.

The supposition that the word grant created a warranty or for grant- or covenant by implication seems to have been founded in or s wnote estate implied error, at least when a fee was conveyed, or the whole of no warranty. the grantor's estate; but in a lease for years rendering

<sup>(</sup>a) Davidson Con. Prec. 6 ed. p. 32; 7 ed. 33.

<sup>(</sup>b) Upton v. Townend, 17 C. B. 30.

<sup>(</sup>c) See Doe d. Palk v. Marchetti, 1 B. & Ad. 715.

rent it implied a general covenant for quiet enjoyment; Express coveno implied covenant or warranty, however, arose if there ed the implied were an express covenant on the subject (a).

warranty.

The warranty and right of re-entry arising at Common Exchange, Law on the word Exchange was before explained in treating of sec. 4(b).

This section should have extended to a purtition and to On a partition the word give; for on a partition a right of re-entry on warranty still eviction may arise as before explained (c); and the word give yet continues in some cases to imply a warranty of title. The word Thus, it is said on a gift in tail or lease for life rendering plies a warrent, the donor or lessor and his heirs (to whom the rent is ranty. payable) are bound to warrant the title (d): and on a feoffment in fee since the Statute quia emptores the feoffor during his life is bound to warrant, and before that Act the warranty extended to his heirs if the lands were to be held of, and services rendered to, the feoffor and his heirs (e). By the Imperial Act the word give implies no warranty.

## SECTION 9.

9. The bond fide payment of any money to, and the receipt there- Receipts of of by any person to whom the same is payable upon any express Trustees to be or implied trust, or for any limited purpose, and such payment to charges. and receipt by the survivors or survivor of two or more mortgagees or holders, or the executors or administrators of such survivor, or their or his assigns, shall effectually discharge the Person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary be expressly declared by the instrument creating the trust or security. 12 V. c. 71, s. 10.

The first part of this is framed to meet the rule in equity, that if the trust be of such a nature that the person paying

<sup>(</sup>a) Co. Litt. 384 a. note 1; 4 Cru. Dig. by White, 370; Line v. Stephenson, 5 B. N. C. 183.

<sup>.(</sup>c) Ante p. 55. (d) Black. Com. vol. 2, p. 300. (e) 2 Black. 300; Co. Litt. 384 and note 1, whence it would seem that an express warranty in such case would not override the implied warmaty, Wms. Rl. Prop. 376; 8 ed. 428.

the trustees may reasonably be expected to see to the plication of the money, he will be bound to do so. rule and the exceptions are given fully in the text b (a); they may be briefly illustrated by stating that if trust be for payment of legacies, on specified sched debts, the purchaser has to see that the money is pror applied, but not so when the trust is for payment of d generally.

Payment to be made to

This section does not prevent the application of trustees must rule requiring payment to trustees to be made to all join all, not to one. or on their joint receipt, or to their attorney author by all to receive the money (b).

Imp. Acts.

The Imperial Act of 7 & 8 Vic. c. 76, had a cl corresponding to this section, but for the rea given by Mr. Ker (c) it was deemed too extensive, was repealed by the Act of 8 & 9 Vic. c. 106, and su quently was re-enacted as to trustees only, in less ex sive terms, by the Stat. 22 & 23 Vic. c. 35, s. 23, w confines the protection to payment of purchase or m gage money. A subsequent Act, however, 23 and 24 V 145, s. 29, again gave a wider effect to the receipts of trus

Payment to surviving mortgagee.

The object of that part of this section which relate payment to surviving mortgagees is explained in Mr. E letter (d).

This section is confined in its operation by section 1! matters subsequent to 1st January, 1850 (e). might be some difference of opinion as to whether up the original Act of 12 Vic., the power to give receipts tends to trusts created before that Act(f).

<sup>(</sup>a) Sug. Vend. 13 ed. 540; Dart Vend. 3 ed. pp. 384 et seq; vidson Conv. vol. 3, p. 162, note r.

<sup>(</sup>b) Ewart v. Snyder, 13 Grant, 57, per Mowat. V. C. Paymen the attorney of all have been questioned, Davidson Conv. vol. 3, p. note r; Sugden Vendors, 13 ed. 549; but see Davidson Conv. vol. (c) See his letter in App. 256, note c.

<sup>(</sup>d) See his letter in App.; see also chapter on mortgages.

<sup>(</sup>e) See the observations on that section.

<sup>(</sup>f) See 5 Jur. N. S. pt. 2, pp. 441, 442, where this section is tr of; 2 Davidson Conv. vol. 3, 2 ed. 164, note w; Lewin on Trusts, p. 4th ed.; Bennett v. Lytton, 2 J. & H. 158.

Payment to a trustee, with notice of intention on his Payment. part to commit a breach of trust, would not, it seems be mala fide. within the protection of this section (a).

### SECTION 12.

12. The foregoing sections of this Act shall not extend to any This Act not deed, act or thing executed or done, or to any estate, right or to extend to interest created before the first day of January, one thousand deeds, &c., eight hundred and fifty, but they shall extend to and have opera- fore 1st Jan., tion and effect on and from that day. 12 V. c. 71, s. 14.

It would seem that this section is a new enactment so Varies from far, at least, as relates to sections 2, 3, 4, 5, 6, 7 & 11, and the acts convaries from the Acts consolidated by this Statute, unless not being recontrolled by Con. Stat. U. C. ch. 1, secs. 5, 6, 7, 8, 9, trospective, The variance seems to have arisen thus: the Act of 12 Vic. unless controlled by was not retrospective, except as to contingent remainders Con. St. c. 1. (see its sec. 14); neither was the Imperial Statute 7 & 8 Vic. from which it was taken. The Imperial Act 8 & 9 Vic. repealed in toto the former Imperial Act. and reenacted in better terms, and with some variance, most of its provisions: it designedly, and for ample reason, was retrospective in its operation (b). Our Legislature followed the English Legislature, except in one or two particulars: by the Act of 14 & 15 Vic. they repealed all the clauses of the former Act, except those to which secs. 8, 9 & 10 of Con. Stat. respectively answer, the interpretation clause, and that confining the Act to Upper Canada, and also sec. 14 the restriction clause, to which latter the sec. 12, now in question, of the Con. Stat. answers. This sec. 14 was not repealed by reason of certain clauses as above-named being retained, but as regards the repealed clauses, it fell of itself. and even though the subject matter of those clauses should have been re-enacted in the same terms as before (which

<sup>(</sup>a) Lewin on Trusts, 5 ed. 240, referring to Fernie v. Maguire, 6 Ir. Eq.

<sup>(</sup>b) See the final part of Ker's letter in Appendix, who framed the Bill; Upton v. Townend, 17 C. B. 30.

they were not) still that sec. 14 would not have applied. Thus, sec. 5 of 12 Vic. gave the right to convey a contingent interest, and right of entry for condition broken, unless (by sec. 14) such right or interest were created before 1st January 1850 inclusive. Sec. 5 of 14 & 15 Vic. gave the right to convey a contingent interest and a right of entry, which right, as above explained, varies from that alluded to in the former Act: this section, therefore, varies from the old Act there is no restrictive clause to the later Act, and clearly sec. 14 of the former Act would not apply; moreover, a above explained, the later Act was intended to be retrospective. The result is, that though a right of entry on disseisin prior to 1850, and a contingent interest create before 1850 were, by 14 & 15 Vic., capable of being validl conveyed, the Con. Stat. varies the law and withholds from the owner disseised the power he theretofore had of selling and conveying the estate, leaving him in fact as at commor < law (a); and places a person entitled to a contingence interest in the same position, except that the conveyan would be valid in equity as a contract to be perfected b conveyance, when the interest becomes a vested estate (b The above observations apply to other cases, as, for instance under sec. 4.

Rules of construction peculiar to the Con. Stats. on variance between them and the former acts.

When any question of variance arises between Consolidated Statutes and the old Statutes consolidated, referen —ce should be had to Con. Stat. U. C. c. 1. ss. 5, 6, 7, 8, 9, which it may be contended control the operation of the section 12, now under consideration. In construing a Consolidated Statute reference should be made also to the Interpretation Act, section 18. If there be no direct variance between a Consolidated Statute and the former Statute which is consolidated, the old Statute may be looked at to guide in the construction of the new Consolidated Act (c).

<sup>(</sup>a) As to which see, post, the remarks on conveyances of conting interests, pp. 73, 74. (b) See p. 76.

<sup>(</sup>c) Per Draper, C. J., in Bank Upper Canada v. Brough, 2 E. & A. Reports U. C., 101; The Queen v. Whelan, 28 Q. B. U. C. 117.

## SECTION 13.

13. Any Corporation aggregate in Upper Canada, capable of Corporations taking and conveying land, shall be deemed to have been and to aggregate be capable of taking and conveying land by deed of bargain and by bargain sale, in like manner as any person in his natural capacity, subject and sale. nevertheless to any general limitations or restrictions and to any special provisions as to holding or conveying real estate which may be applicable to such Corporation. 4 W. IV, c. 1, s. 46.

So far as regards capacity to take by way of bargain and Corporations sale, the provision of this section was superfluous (a); and might take by it would seem by no means certain that a Corporation gain and sale, could not convey by the same mode.

but doubtful It has been said that though a Corporation could not convey by

become feoffee to uses of lands owned and conveyed by a that mode. feoffor yet they might become seised to uses of their own Can a corpolands (b). Thus A could not enfeoff or release to a Cor-ration stand poration to hold to the use of B, but a Corporation might nee? agree to be seised of their own lands to the use of B, and so convey by way of bargain and sale (c). however, that of their own lands a Corporation might stand seised to uses, it is difficult to say how the uses declared are executed by the Statute of Uses, considering the language of that Statute, and why they do not therefore remain trusts enforceable and recognized only in Equity; for the Statute executes the use only " where any person or persons," shall be seised of any lands, &c., " to the use, confidence, or trust of any other person or persons or body politic" (d).

In practice, the above distinction was, however, not acted on, and authority is not wanting that a Corporation could not under any circumstances stand seised to uses,

<sup>(</sup>a) 1 Saunders on Uses, 60; Gilbert on Uses, 3 ed. by Sugden, p. 191; Jones on Uses, 40; see also the language of the Statute of Uses, p. 90.

<sup>(</sup>b) See note by Sugden to Gilbert on Uses, 3 ed. p. 7; also Preston Coa. vol. 2, p. 234; Jones on Uses, p. 40.

<sup>(</sup>c) See last note. It is treated as doubtful in Grant on Corporations. (d) See Bacon on Uses, and the language of the Act, post, under sec. 14 of this Act.

either as feoffees or releasees of lands of others, or as bargainors of their own lands. It was once a maxim with respect to a feoffee to uses that there should be confidence in the person, and it was ruled that for want of this a Corporation could not stand seised to a use, for how, it was said, could a Corporation be confided in when it had not a soul? (a). Another reason assigned was that a Corporation was framed at the will of the King for certain purposes, and was no further capable than he willed them. and, moreover, that being incorporate, the Chancery had no process to compel them to discharge the use or trust (b). This latter ground has long since ceased to exist, and with it the necessity for personal confidence (c). A strong argument as against a Corporation standing seised to a use, is furnished by the language of the Statute of Uses above referred to, which does not take in the case of a Corporation seised to a use, from which it is to be inferred that the Legislature supposed a Corporation could not so stand seised (d).

Importance of the question, whether can stand seised to a use.

It is to be observed that the section under consideration does not enact that a Corporation may stand seised to a a corporation use, but only gives it capability to convey by bargain and sale, and therefore, in any case in which a Corporation should be made grantee or releasee to uses, the matters above considered become of importance in determining whether the uses declared are valid as such, and if so, whether the Statute of Uses would execute them. It would seem both points must be answered in the negative. Again, if it be that a Corporation could not stand seised to a use of its own lands even, then, as this section gives no such power, but merely gives power to convey by bargain and

<sup>(</sup>a) Lewin on Trusts, introduction, p. 2; see also 1 Saunders on Uses, 59.

<sup>(</sup>b) Gilbert Uses, 3 ed. by Sugden, pp. 6, 7, 367,

<sup>(</sup>c) Lewin Trusts, introduction, p. 9; note, by Sugden, to Gilbert on Uses, p. 7; 1 Ves. Jr. 468; 1 Ves. Sen. 536.

<sup>(</sup>d) Bacon on Uses; see also notes, by Sugden, to Gilbert on Uses, 3 ed. pp. 6, 7.

might be urged that such a conveyance from a stion would operate as a statutory grant, or Comw conveyance, transferring the estate to the grantee; any use raised in the Corporation, (of which they ot stand seised), and without the aid of the Statute

If this be so, and if no use be raised in the Corby reason of their incapacity to stand seised, then
declared on the seisin of the bargainee, being the
would be executed in favor of the cestui qui use,
im the legal estate, and would not give him a
quitable interest, as would be the case on a bargain
by an individual to a bargainee to hold to the use
er. It is presumed, however, the Courts would
same effect to a bargain and sale by a Corporaby an individual as regards uses declared, and
onsider that virtually this section enables a Corn, on the bargain and sale, to stand seised to the
he bargainee (a).

#### SECTION 14.

ed of bargain and sale of land in Upper Canada, executed Deed of barnt to the 6th day of March, one thousand eight hundred gain and sale y-four, shall require enrolment or registration to supply shall not require enrolment, for the mere purpose of rendering such ment to render as a valid and effectual conveyance for passing the der it a valid eby intended to be bargained and sold; but this shall; any question of priority under the Registry Act. 4 W. s. 47,—13, 14 V. c. 63, s. 3.

ommon Law no deed or writing was requisite to Uses and baror rather as evidence of the creation of, an use, gain and sale
as then in effect what is now a trust. The verbal at common
on sufficient consideration, raised the use in the
or to hold for the bargainee; on this the Court of
y held the bargainor, who continued to retain the
ate, to be trustee for the bargainee, who was enthe whole beneficial use, which was descendible,
e, and assignable without livery.

however, Hayes Conv. vol. 2, 5th ed., p. 80, note 64.

Stat. of Uses.

Language of s. 1 of St. of

The object of the Statute of Uses was to abolish the doctrine of trusts, and to annex the legal ownership to the Its language is as follows:—"The beneficial interest. where any person or persons stand or be seized, or at anatime hereafter shall happen to be seized of and in arahonors, castles, manors, lands, tenements, rents, services reversions, remainders, or other hereditaments, to the use confidence, or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffmerat fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner, means, whatsoever it be: in every such case, all and every such person and persons and bodies politic. that have or hereafter shall have any such use confidence or trust in fee simple, fee-tail, for term of life. or for years, or otherwise, or any use, confidence or trust in remainder or reverter, shall from henceforth stand and be seized, deemed and adjudged in lawful seizin, estate and possession of and in the same honors, &c., with their appurtenances, to all intents, constructions and purposes in the law of and in such like estates as they had or shall have in the use, trust or confidence of or in the same; and that the estate, title, right and possession that was in such person or persons that were or hereafter shall be seized of any lands, tenements, or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use, confidence or trust after such quality, manner, form and condition as they had before, in or to the use confdence or trust that was in them."

The Statute failed to attain its object, and to destroy trust estates, by reason of its being considered that the Statute exhausted itself in executing the first use declared and was powerless as regards any further use, which is trust as now recognized in Courts of Equity. The effect of the Act was to introduce a new and secret mode conveyance, passing the legal estate without livery.

Effect of St. of Uses on a bargain and sale.

the mere verbal bargain or contract of sale on ifficient consideration: nor were any words of inheritance equisite to carry a fee, as a contract for a fee was implied. nless the contrary were expressed (a).

The Statute of Enrolments, 27 H. 8, c. 16, was passed St. of Enrolwith a view to prevent the clandestine character of the ments. conveyance by way of bargain and sale, and denies effect to every such conveyance of a freehold "except the same be by writing, indented, sealed and enrolled in one of the King's Courts of Record at Westminster," or within the County where the lands lay, before the Custos Rotulorum and two Justices of the Peace and the Clerk of the Peace of the same County, or any two of them, whereof the Clerk to be one, and the enrolment to be within six months after late of the instrument.

The first Provincial Act on the subject, 37 Geo. 3, ch. 8, Provincial recited, that conveyances by way of bargain and sale "not Acts as to baraving been enrolled in a Court of Record are not valid in sales. aw," and substituted therefor the County Registry Office, with a retrospective operation (b). The Statute, 4 Wm. b, ch. 1, sec. 47, abolished the necessity for any enrolnent or registry, except to preserve priority of title under he Registry Act; this Act was held to be retrospective (c). The Stat. 9 Vic. ch. 34, sec. 14, declared that registry should be equivalent to enrolment, but this was repealed by Stat. 13 & 14 Vic. ch. 63, sec. 3, reciting that the effect of the former Act might be to render doubtful the meaning of the Act of 4 Wm. 4.

These Statutes, combined with a decision (d) that a deed poll may operate as a bargain and sale, have virtually repealed the Statute of Enrolments.

A bargain and sale to operate under the Statute of Uses The considercannot be good, except on the consideration of money or ation requisite as to bar-money's worth; a rent reserved, though but a pepper-corn gain and sale,

<sup>(</sup>a) Jones on Uses. (b) Rogers v. Barnum, 5 Q. B. O. S. U. C. 252. (c) Rogers v. Barnum, supra; Doe d. Louckes v. Fisher, 2 Q. B. U. C. 470.

<sup>(</sup>d) Rogers v. Barnum, supra.

will suffice (a). If a valuable consideration be proved to have been given, though not expressed, or if expressed, though proved not to have been given, it will suffice (b). sideration need not proceed from the bargainee to thbargainor (c).

it may operor otherwise,

If the instrument fail to take effect as a bargain and sales ete as a grant for want of proper consideration, or otherwise, it may open rate as a grant or covenant to stand seized on consideration of blood, or otherwise, as before explained (d).

incorporeal hereditaments cannot be created by it.

Not only corporeal, but also incorporeal hereditamen t may be conveyed by bargain and sale; but the latter muss be in existence at the time of conveyance. Therefore thing not in esse, as a right of way not before created, camnot be created by bargain and sale (e). The Statute of Uses (f) executes the use "when any person shall be seised, &c., to the use, &c.," and therefore though a freeholder can create a term by bargain and sale out the estate of which he is seised, no term when once created can be so conveyed, for of such the termor is not seised but possessed. Contingent interests and possibilities cannot be conveyed by bargain and sale (q).

nor terms of years or contingent interests conveyed by it.

> Other matters and disadvantages attending this mode of conveyance, were before referred to (h).

<sup>(</sup>a) 4 Cruise, T. 32 ch. 9, secs. 25, 26; Smith Rl. Prop. 3 ed. 656-

<sup>(</sup>b) Smith Rl. Prop., 3 ed. 656.

<sup>(</sup>c) Id. (d) Aute p. 51.

<sup>(</sup>e) Smith Rl. Prop., 3 ed. 656.

<sup>(</sup>f) See the language of the Act, ante p. 90.

<sup>(</sup>g) Watkins Conv. 355, 9 ed. (h) Ante pp. 49, 50.

## CON. STAT. CH. 91.

# An Act respecting short forms of Conveyances.

- 1. When a deed made according to the forms set forth in the Where words first Schedule to this Act, or any other deed expressed to be made of column 1 of in pursuance of this Act, or referring thereto, contains any of the Schedule are forms or words contained in column one of the second Schedule employed, the hereto annexed, and distinguished by any number therein, such deed to have the same efdeed shall be taken to have the same effect, and be construed as fect as if the if it contained the form of words contained in column two of the words in column 2 were same Schedule, and distinguished by the same number as is an-inserted. nexed to the form of words used in the deed; but it shall not be necessary, in any such deed, to insert any such number. 6, s. 1.
- 2. Any deed or part of a deed, which fails to take effect by Deeds failing virtue of this Act, shall, nevertheless, be as effectual, to bind the to take effect parties thereto, so far as the rules of law and equity will permit, to be as valid as if this Act had not been made. 9 V. c. 6, s. 4.
- 3. Every such deed, unless an exception be specially made made. therein, shall be held and construed to include all houses, out Deed to inhouses, edifices, barns, stables, yards, gardens, orchards, commons, ses, &c.. and trees, woods, underwoods, mounds, fences, hedges, ditches, ways, the reversion, waters, water-courses, lights, liberties, privileges, easements, estate, &c. Profits, commodities, emoluments, hereditaments and appurtenances whatsoever, to the lands therein comprised, belonging or in any wise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof; and if the same purports to convey an estate in fee, also the reversion or reversions, remainder and remainders, yearly and other rents, issues and profits of the same lands, and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever, both at law and in equity, of the grantor in, to, out of, or upon the same lands, and every part and parcel thereof, with their and every of their appurtenances. 9 V. a. 6, s. 2.

as if Act not

clude all hou-

Construction of Act.

4. In the construction of this Act, and the Schedules thereto, unless there be something in the subject or context repugnant to such construction, the word "lands" shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, or any undivided part or share therein, respectively; and the word "party" shall mean and include any body politic or corporate or collegiate as well as an individual. 9 V. c. 6, s. 5.

Remuneration for deeds under the Act not to be by length only.

5. In taxing any bill for preparing and executing any deed under this Act, the taxing officer, in estimating the proper sunto be charged therefor, shall consider not the length of such deed but the skill and labour employed and responsibility incurred in the preparation thereof. 9 V. c. 6, s. 3.

Schedules, &c., to form part of Act.

6. The Schedules, and the directions and forms therein cotained, shall be deemed parts of this Act. 9 V. c. 6, s. 6.

#### THE FIRST SCHEDULE.

This Indenture, made the day of , one thousand eight hundred and , in pursuance of the A to facilitate the conveyance of real property, between (here insert names of parties and recitals, if any,) Witnesseth, that in compaideration of dollars, of lawful money of Canada, now paid by the said (grantee or grantees) to the said (granter or grantoms) (the receipt whereof is hereby by him (or them) acknowledged,) he (or they) the said (grantee or grantees) his (or their) heirs and assigns for ever, all, &c., (parcels.) (Here insert covenants, or any other provisions.)

In witness whereof, the said parties hereto have hereunto set their hands and seals.

### THE SECOND SCHEDULE.

DIRECTIONS AS TO THE FORMS IN THIS SCHEDULE.

In cases of Sale and Conveyance of Reul Property.

1. Parties who use any of the forms in the first column of this Schedule, may substitute for the words "covenantor" or "covenantee," or "releasor" or "releasee," "grantor" or "grantee," and in every such case, corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

- 2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in any of the forms in the first column of this Schedule, and corresponding changes shall be taken to be made in the corresponding forms in the second column.
- 3. Such parties may introduce into, or annex to, any of the forms in the first column, any express exceptions from, or other express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.
- 4. Such parties may add the name or other designation of any lierson or persons, or class or classes of persons, or any other words, at the end of form two, of the first column, so as thereby to extend the words thereof to the acts of any additional person or persons, or class or classes of persons, or of all persons whomsoever; and in every such case the covenants two, three and four, or such of them as may be employed in such deed, shall be taken to extend to the acts of the person or persons, class or classes of Persons, so named.

COLUMN ONE.

#### COLUMN TWO.

- 1. The said (covenantor) Covenants with the said (covenantee).
- 1. And the said covenantor doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree, with and to the said covenantee, his heirs and assigns, in manner following, that is to say:
- 2. That he has the right to convey the said lands to the said (covenantee) not withstanding any act of the said (covenantor.)
- 2. That for and notwithstanding any act, deed, matter or thing by the said covenantor, done, executed, committed, or knowingly or wilfully permitted or suffered to the contrary, he, the said covenantor, now hath in himself good right, full power, and absolute authority, to convey the said lands and other the premises hereby conveyed, or intended so to be, with their and every of their appurtenances, unto the said covenantee, in manner aforesaid, and according to the true intent of these presents.
- 3. And that the said (corenantee) shall have quiet possession of the said lands.
- 3. And that it shall be lawful for the said covenantee, his heirs and assigns, from time to time and at all times hereafter, peaceably and quietly to enter upon, have, hold, occupy, possees and enjoy the said land and premises hereby conveyed, or intended so

COLUMN ONE.

#### COLUMN TWO.

to be, with their and every of their appurtenan and to have, receive and take the rents, issues profits thereof, and of every part thereof, to and his and their use and benefit, without any let, trouble, denial, eviction, interruption, claim or mand whatsoever, of, from, or by him the covenantor, or his heirs, or any person claiming to claim, by, from, under, or in trust for him, thor any of them.

4. Free from all in-

- 4. And that free and clear, and freely and a lutely acquitted, exonerated, and for ever dischar or otherwise by the said covenantor or his hwell and sufficiently saved, kept harmless, and demnified of, from and against any and every for and other gift, grant, bargain, sale, jointure, do use, trust, entail, will, statute, recognizance, jument, execution, extent, rent, annuity, forfeit re-entry, and any and every other estate, the charge, trouble and incumbrance whatsoever, mexecuted, occasioned, or suffered by the said conantor or his heirs, or by any person claiming to claim, by, from, under or in trust for him, the or any of them.
- 5. And the said (covenants with the said (covenants with the said (covenants) that he will execute such further assurances of the said lands as may be requisite.
- 5. And the said covenantor doth hereby, himself, his heirs, executors and administrat covenant, promise and agree with, and to the covenantee, his heirs and assigns, that he the covenantor, his heirs, executors and administraand all and every other person whosoever ha or claiming, or who shall or may hereafter have claim, any estate, right, title or interest whatsoe either at law or in equity, in, to, or out of, the lands and premises hereby conveyed, or intende to be, or any of them, or any part thereof, by, fi under, or in trust for him, them, or any of th shall and will, from time to time, and at times hereafter upon every reasonable request. at the costs and charges of the said covenantee, heirs or assigns, make, do, execute or cause to

LUMON ONE.

#### COLUMN TWO.

made, done, or executed, all such further and other lawful acts, deeds, things, devices, conveyances, and assurances in the law whatsoever, for the better. more perfectly, and absolutely conveying and assuring the said lands and premises hereby conveyed, or intended so to be, and every part thereof, with their appurtenances, unto the said covenantee, his heirs and assigns, in manner aforesaid, as by the said cov enantee, his heirs and assigns, his or their counsein the law, shall be reasonably devised, advised or required, so as no such further assurances contain or imply any further or other covenant or warranty than against the acts and deeds of the person who shall be required to make or execute the same, and his heirs, executors or administrators, only, and so as no person who shall be required to make or execute such assurances, shall be compellable for the making or executing thereof, to go or travel from his usual place of abode.

6. And the mid (covenantor) covements with the mid (covenantee) that be will proleeds enuperated herender, and llow copies be made of bem, at the Pense of the uid (copeantee).

6. And the said covenantor, doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree with and to the said covenantee, his heirs and assigns, that the said covenantor and his heirs shall and will, unless preince the title vented by fire or other inevitable accident, from time to time, and at all times hereafter, at the request, costs and charges of the said covenantee, his heirs or assigns, or his or their attorney, solici. tor, agent, or counsel, at any trial or hearing in any action or suit at law or in equity, or other judicature, or otherwise, as occasion shall require, produce all and every or any deed, instrument or writing hereunder written, for the manifestation, defence and support of the estate, title and possession of the said covenantee, his heirs and assigns, in, or to, the said lands and premises hereby conveyed, or intended so to be, and at the like request, costs and charges, shall and will make and deliver, or cause to be made and delivered, true and attested, or

#### COLUMN ONE.

#### COLUMN TWO.

other copies or abstracts of the same deed ments and writings respectively, or any and shall and will permit and suffer such or abstracts to be examined and compared said original deeds, by the said covenantee, and assigns, or such persons as he or they that purpose direct and appoint.

- 7. And the said (covenants with the said (covenants with the said (covenantee) that he has done no act to incumber the said lands.
- 7. And the said covenantor, for himself, executors and administrators, doth hereby c promise and agree with and to the said could his heirs and assigns, that he hath not at heretofore made, done, committed, executed fully or knowingly suffered any act, deed, thing whatsoever, whereby or by means the said lands and premises hereby con intended so to be, or any part or parcel the is, or shall or may be in any wise in charged, affected, or incumbered in title, otherwise howsoever.
- 8. And the said(releasor) releases to the said(releasee) all his claims upon the said lands.
- 8. And the said releasor hath released. and forever quitted claim, and by these doth release, remise, and forever quit cla the said releasee, his heirs and assigns, al manner of right, title, interest, claim, and whatsoever, both at law and in equity, into of the said lands and premises hereby gra intended so to be, and every part and parce so as that neither he nor his heirs, execu ministrators, or assigns, shall nor may, at : hereafter, have, claim, pretend to, challens mand the said lands and premises, or thereof, in any manner howsoever, but releasee, his heirs and assigns, and the saand premises shall from henceforth for e after be exonerated and discharged of all claims and demands whatsoever, which releasor, might or could have upon him it of the said lands, or upon the said lands.
- 9. And the said (A. B.)
- 9. And the said (A. B.) wife of the said ( for and in consideration of the sum of

#### COLUMN ONE.

#### COLUMN TWO.

wife of the said (grantor) bereby bars her dower in the said lands

dollars, of the lawful money of Canada, to her in hand paid by the said (grantee) at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted and released, and by these presents doth grant and release unto the said (grantee) his heirs and assigns all her dower and right and title which in the event of surviving her said husband, she might or would have to dower, in, to, or out of the lands and premises hereby conveyed, or intended so to be.

This Act is taken from the Imperial Act 8 & 9 Vic., ch. Imp. Act 8 & 119, and its object is to relieve from the labor of inserting V. c. 119. covenants at length, and all the estate clause, &c., and give to a conveyance drawn under it, using the short forms, the same efficacy and effect as would have been given to it if drawn irrespective of the Act, with the use of the corresponding lengthy forms. A recent case (a), however, Has a conveywould seem to indicate that, under certain circumstances, ance referring to the act an a conveyance may be aided in its effect if expressed to be effect it other drawn "in pursuance of the Act to facilitate the convey-wise would ance of real property." In one case (b) an indenture dated in 1852 (c), expressed to be drawn in pursuance of the Act to facilitate, &c., for a consideration of £75, with a limited covenant for possession and further assurance, was held sufficient to pass the fee, though the only operative words were quit claim and release, and the releasee had neither possession nor estate whereon a release could operate. McLean, C. J., and Burns, J., particularly referred to the fact that the deed was expressed to be in pursuance of the Act to facilitate the conveyance of real property. and that it contained covenants for possession and further assurance.

<sup>(</sup>a) Cameron v. Gunn, 25 Q. B. U. C. 77.

<sup>(</sup>b) Nicholson v. Dillabough, 21 Q. B. U. C. 595.

<sup>(</sup>c) The date given to the indenture in the report is a misprint; the date there given is 1842, but the Act was not passed till 9 Vic. The prior part of the report gives the correct date.

In the next case (a) the defendant, by deed, dated in 1865, remised, released, and forever quitted claim to the plaintiff for a consideration of 5s. and without covenants. The Court referred to the fact that the former case was expressed to be in pursuance of the Act, that it was for £75, and contained a covenant that the purchaser might enter and take possession, all which they said was wanting in the case before them, and the instrument was held inoperative as either a release, grant, or bargain and sale. Considering that the Court merely distinguished the cases on the grounds above mentioned; considering also that to the validity of a bargain and sale, a consideration of 5s, is as sufficient as a consideration of £75, and that to the validity of a deed as a grant, no consideration is requisite (at least when expressed to be to the use of the grantee, so as to prevent the use resulting to the grantor), it would seem that the Court, in denving efficacy to the deed, must (if they recognized the former case as law) have relied on the fact that it was not expressed to be in pursuance of the Act to facilitate the conveyance of real property, and contained also no covenants for possession or further assurance, and probably chiefly on the latter grounds (b).

It should be remembered that there is no longer an Act entitled "an Act to facilitate the conveyance of real property;" the original Act of 9 Vic. so entitled having been consolidated, and entitled "an Act respecting short forms of conveyances;" a corresponding change was omitted, however, in the first schedule.

On the whole it is submitted that at present a mere reference to this Act will not give a conveyance any greater efficacy than otherwise it would have, except as pointed out in the Act.

The operative word grant made use of by mistake.

There is a singular mistake in this Act, in that the only operative word made use of is the word "grant," whereas

<sup>(</sup>a) Cameron v. Gunn, supra.

<sup>(</sup>b) See the observations of Draper, C. J., and Morrison, J., in Acre v. Livingstone, 26 Q. B. U. C. pp. 285, 288, 296; but see, per Hagarty, J., 292.

lands, that is the immediate freehold, did not at the time of the passing of the Act lie in grant, nor was it till some time afterwards that lands acquired that capacity (a). The error arose from copying the English Act without attention to the fact, that at the time of passing the Act in England. lands there did lie in grant. The error is important, because in some cases a conveyance may be found to fail entirely, and in other cases only to operate by the raising of a use when it was not intended, and thus causing the uses expressly declared, to be but uses on a use, and therefore trusts. Whatever doubt there may be as to whether Tords of release only may operate as a grant or bargain resale (b), there can be no doubt that a deed using only The word grant" as an operative word, may take effect as a bar-grant may sain and sale, if on a pecuniary consideration, or as a co-bargain and renant to stand seised if on a consideration of blood or sale, release, narriage, or as a release if there be possession or a vested ≥state whereon it can operate, or as an assignment, surrender, and in other modes. The nugatory grant therefore might be valid as a bargain and sale, or covenant to stand seised, but in such cases, if uses were declared, it would But if it operbe attended with the results above alluded to, of misplac-ates as a baring them and also the legal estate, by the use being raised, the deed may unintentionally, yet necessarily, in the bargainor or co-not operate as Thus, if A, in anticipation of marriage, had by intended. way of settlement, granted to B and his heirs, to the use of him A and his heirs till marriage, and thereafter to other uses declared, the instrument would have been Void as a grant; and though if a pecuniary consideration had been expressed, it might have operated as a bargain and sale, then the fee would have been in B in trust for A, and not in A, as intended; and if the marriage had happened, the uses declared, which it was intended should confer legal estates, as being executed in possession by the

<sup>(</sup>a) 14 & 15, Vic. c. 7, s. 2; Con. St. c. 90, s. 2; see however the effect of 12 Vic. c. 71, s. 2, repealed by 14 & 15 Vic. c. 7,

<sup>(</sup>b) See Cameron v. Gunn, and Nicholson v Dillabough, supra, in the text and notes.

Statute of Uses, would have been mere trusts. So also, it A had granted to B, in fee, to the use of him, A, and another, in fee, with a view to vest the estate in himself and such other jointly, (a case very likely to have occurred on appointment of a new trustee), the deed was either inoperative, or if it could have operated as a bargain and sale, the legal estate would have been in B. In the above and the like cases the intention was that the instrument should operate as a conveyance at Common Law, and that the first use raised should be in the grantee to uses, and this would be so, and the instrument would so operate now that lands lie in grant; but if it can only be supported as a bargain and sale, or covenant to stand seised, the first use raised is of course in the bargainor or covenantor.

If the instrument could be supported as a Common Law conveyance by way of release, it would work as intended, but this presupposes possession, or some vested estate, at least, in the releasee. Possibly the Act of 12 Vic. ch. 7l, sec. 2 (repealed) might aid the want of possession, or of estate, in cases of grants after that Act: the construction of that section is, however, as pointed out by Mr. Ker, very obscure (a).

Caution required in the use of the forms.

Great caution appears requisite in the use of this Act, as the forms in its schedules are, in strictness, appropriate only to the most simple conveyances. The form in the first schedule is that of a grant in fee simple, and the covenants in the second section are framed with reference to an assurance of that simple description; and it may be useful to impress upon parties who choose to avail themselves of the Act, that more than usual care will be necessarv to have their deeds accurately engrossed. gives a particular efficacy to a particular form of words, and the slightest deviation from that form will endanger the operation of the Statute with reference to the covenant in which the mistake occurs: and such covenant may then, under the second section, be left to the very doubtful effect it may have by its own independent operation.

<sup>(</sup>a) See letter of Mr. Ker, in Appendix.

on 3 of schedule 2 authorizes the introduction of Danger of ons and qualifications of the covenants, but for the varying the above given it is dangerous to interfere with the nless in very clear cases, for it may not be easy to ne what is the introduction of an exception or qual-Thus the superadding to the covenant for right ev free from incumbrance, the words "except a mortgage dated, &c.," would clearly be within the v: but in the very common case of striking out Effect of strikrds "notwithstanding any act of the said cove-ing out the with a view to render the covenant for right to con-withstanding I all subsequent covenants unqualified, it is by no any act," &c. clear that is an introduction of an exception or tion: it is rather the omission of that which is into enlarge the covenant and deprive it of its exand qualified character, and render it according common expression "full and unlimited." f covenants in the Act did not, as in effect they do. the acts of all other than the covenantor, and were fined only, as they are, to his acts, &c., and the words hstanding any act of the covenantor" had accorden omitted in the Act, then the insertion of those by the conveyancer would have been the introducan exception and qualification within the Act; and be so, the omission of those words cannot be the ing, and be also an introduction of a qualification. rough the omission of the words should be within as regards the first covenant, it by no means follows e effect of such omission would extend to the folcovenants, and if not, they would remain qualified he common practice in the profession is to strike words "notwithstanding, &c.," under the belief ereby all the covenants are to be read as in the column, but unqualified, and without any acts or of any one being excepted. If, however, the above s are entitled to any weight, it might be prudent in ses to give the covenants at full length.

enchard v. Hoskins, Winch. 91; 1 Sid. 328; Browning v. 1 B. & P. 18.

Covenants should extend to matters to which the covenantor may have been party or privy,

The forms of covenants adopted have received the same tion of the use of centuries, and as their effect is well under stood, and they have been illustrated by many cases, it i very unwise to vary from them without necessity. It has been said, however, that in some respects the forms are no sufficiently extensive, and that they should extend t matters to which the covenantor may have been party o privy, for that these words are not included within th words "permitted or suffered (a). Therefore where a mer trustee to bar dower (the purchaser taking the fee, subjec to his interposed estate) (b), joined with the purchaser i making a mortgage, having previously concurred with hir in another conveyance (c), it was of course held that th latter conveyance was a breach of his covenant that he ha done no act to encumber the estate, and the Court woul not look to the value of his estate or the trust engrafte on it; but it was held that he was not responsible for th concurrence of the purchaser in the same deed, although b had covenanted that he had not permitted or suffered an act whereby any incumbrance was created. The commo words that he had not been "party or privy." &c., woul have given a remedy under the covenant, for of course b was party, and therefore privy to the conveyance, althoug the purchaser might have conveyed without him. So agai the covenants extend only to acts, &c., knowingly or wi fully suffered or permitted to the contrary, and not to a defaults of the covenantor, and the distinction is ver material (d).

also to defaults.

Imprudent to

enant, as the

and are not

co-extensive.

It is not prudent to omit a covenant, as for instance th omit any covcovenant for quiet possession or further assurance, unde remedies vary the impression that the covenant for right to convey fre from all incumbrances will afford in all cases an adequat Thus, larger damages may be recovered unde the covenant for quiet enjoyment than under that for righ

Damages.

<sup>(</sup>a) Sug. Vend., 13 ed. 490.

<sup>(</sup>b) As to the nature of this estate, see the chapter on dower.

<sup>(</sup>c) Hobson v. Middleton, 6 Bar. and Cres. 295.

<sup>(</sup>d) Sug. Vend., 13 ed. 490.

to convey (a); under the latter, unless in cases of actual or constructive fraud by the covenantor, defect in title through his default, or the right of some one claiming under him, and the like, no greater damages can be recovered, as a general rule, than the purchase money and interest. So, on the other hand, the remedies on covenant for right to convey are not always supplied by the covenant for quiet possession, as under the latter no cause of action arises till disturbance. Under the covenant for right to convey only nominal damages are recoverable, unless there be proof of actual damage or eviction (b).

<sup>(</sup>a) Hodgins v. Hodgins, 13 C. P. U. C. 146, Richards, J., dissentiente.
(b) Bannon v. Frank, 14 C. P. U. C. 295; Snider v. Snider, 13 C. P. U. C. 157; Graham v. Baker, 10 C. P. U. C. 427.

## CON. STAT. CH. 92.

## An Act respecting Short Forms of Leases.

Where words of column 1 of the second Schedule are deed to havethe same effect as if the words in column 2 were inserted.

1. When a deed, made according to the forms set forth in the first Schedule to this Act, or any other deed expressed to be made in pursuance of this Act, or referring thereto, contains any of employed, the the forms or words contained in column one of the second Schedule hereto annexed and distinguished by any number therein. such deed shall be taken to have the same effect, and be construed as if it contained the form of words contained in column two of the same Schedule, and distinguished by the same number as is annexed to the form of words used in the deed; but it shall not be necessary, in any such deed, to insert any such number. 15 V. c. 8, s 1.

Deeds failing to take effect under this act as if this act

not made. Deed to include all

houses, &c.

- 2. Any deed or part of a deed, which fails to take effect by virtue of this Act, shall nevertheless be as effectual to bind the to be as valid parties thereto, so far as the rules of law and equity will permit, as if this Act had not been made. 14, 15 V. c. 8, s. 3.
  - 3. Every such deed, unless an exception be specially made therein, shall be held and construed to include all out-houses buildings, barns, stables, yards, gardens, cellars, ancient and other lights, paths, passages, ways, waters, water-courses, liberties, privileges, easements, profits, commodities, emoluments, heredit ments and appurtenances whatsoever, to the lands and tenemen therein comprised belonging or in any wise appertaining. 14, I V. c. 8, s. 2.

#### THE FIRST SCHEDULE.

This Indenture, made the , in the year of Our Lord one thousand eight hundred and in pursuance of the Act respecting short forms of leases between , of the first part, and , of the secons part, Witnesseth, that in consideration of the rents, covenan and agreements, hereinafter reserved and contained on the part the said party (or parties) of the second part, his (or their) execution tors, administrators and assigns, to be paid, observed, and pe formed, he (or they) the said party (or parties) of the first pe

hath (or have) demised and leased, and by these presents do (or doth) demise and lease unto the said party (or parties) of the second part, his (or their) executors, administrators, and assigns, all that Messuage and Tenement situate, (or all that parcel or tract of land situate) lying and being (here insert a description of the premises with sufficient certainty).

To have and to hold the said demised premises for and during the term of , to be computed from the day of , one thousand eight hundred and , and from thenceforth next ensuing and fully to be complete and ended.

Yielding and paying therefor yearly and every day during the said term hereby granted unto the said party (or parties) of the first part, his (or their) executors, administrators, or assigns, the sums of , to be payable on the following days and times, that is to say: (on, &c.,) the first of such payments to become due and be made on the day of paxt.

#### THE SECOND SCHEDULE.

#### DIRECTIONS AS TO THE FORMS IN THIS SCHEDULE.

In case of the Leasing of Lands and Tenements.

- 1. Parties who use any of the forms in the first column of this Schedule, may substitute for the words "lessee" or "lessor" any name or names, and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.
- 2 Such parties may substitute the feminine gender for the masculine, or the plural number for the singular in the form in the first column of the Schedule, and corresponding changes shall be taken to be made in the corresponding forms in the second column.
- 3. Such parties may introduce into or annex to any of the forms in the first column any express exceptions from or express qualification thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.
- 4. Where the premises demised are of freehold tenure, the covenants 1 to 8 shall be taken to be made with, and the proviso 9 to apply to the heirs and assigns of the lessor; and where the premises demised shall be of leasehold tenure, the covenants and

proviso shall be taken to be made with, and apply to this executors, administrators and assigns.

COLUMN ONE.

COLUMN TWO.

- 1. That the said (lessee) covenants with the said (lessor) to pay rent.
- 1. And the said lesses doth hereby for his heirs, executors, administrators and covenant with the said lessor that he, the s his executors, administrators and assigns ing the said term, pay unto the said lessor hereby reserved, in manner hereinbefore n without any deduction whatsoever.
- 2. And to pay taxes.
- 2. And also will pay all taxes, rates, d assessments whatsoever, whether municip mentary or otherwise, now charged or he be charged upon the said demised premise the said lessor on account thereof.
- 3. And to repair.
- 3. And also will, during the said term sufficiently repair, maintain, amend and said demised premises with the appurter good and substantial repair, and all fix things thereto belonging, or which at any ing the said term shall be erected and ms where and so often as need shall be.
- 4. And to keep up fen-
- 4. And also will from time to time, d said term, keep up the fences and walls of ing to the said premises, and make anew thereof that may require to be new-made and husbandlike manner, and at proper the year.
- 5. And not of to cut down timber.
- 5. And also will not at any time durin term, hew, fell, cut down or destroy, or knowingly permit or suffer to be hewed, a down or destroyed, without the consent i of the lessor, any timber or timber trees, necessary repairs, or firewood, or for the p clearance, as herein set forth.
- And that the said (lessor)may enter and view state of repair, and that the said
- 6. And it is hereby agreed that it shall for the lessor and his agents, at all reasons during the said term, to enter the said premises to examine the condition thereof ther that all want of reparation that upon

COLUMN ONE.

#### COLUMN TWO.

repair according to notice. shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee, his executors, administrators and assigns will, within three calendar months next after such notice, well and sufficiently repair and make good accordingly,

7. And will not sheigh or sub-let without leave. 7. And also that the lessee shall not, nor will during the said term, assign, transfer or set over, or otherwise by any act or deed procure the said premises or any of them to be assigned, transferred, set over or sub-let unto any person or persons whomsoever, without the consent in writing of the lessor, his heirs or assigns first had and obtained.

8. And that he will leave the premises in good repair. 8. And further, the lessee will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor the said premises hereby demised with the appurtenances, together with all buildings, erections and fixtures thereon in good and substantial repair and condition, reasonable wear and tear and damage by fire only excepted.

9. Proviso for re-entry by the said (lessor) on nonpayment of rent or nonperformance of covenants.

9. Provided always, and it is hereby expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand shall have been made thereof, or in ease of the breach or non-performance of any of the covenants or agreements herein contained on the part of the lessee, his executors, administrators or assigns, then and in either of such cases it shall be lawful for the lessor at any time thereafter, into and upon the said demised premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, repossess and enjoy, as of his or their former estate; any thing hereinafter contained to the contrary notwithstanding.

10. The said (Lessor) covenants with the said

10. And the lessor doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the lessee, his executors, administrators

COLUMN ONE.

COLUMN TWO.

(lessee) for quiet enioyment.

and assigns that he and they paying the reserved, and performing the covenants l on his and their part contained, shal peaceably possess and enjoy the said den ses for the term hereby granted, withou ruption or disturbance from the lessor executors, administrators and assigns, c person or persons lawfully claiming b under him, them or any of them.

This Act is taken from the Imperial Act of Imp. St. 8 & 9 V. c. 124. Some of the observations made in reg Act respecting short forms of conveyances apply t

Easements not legally appurtenant will not pass.

As regards easements this Act (sec. 3) is less than the Act as to conveyances, for easements w been used and enjoyed with the premises are no and there may be such which would not pass as or legally appurtenant to the premises (a).

Discrepancy in covenants in obligation to repair in case of fire.

There is a discrepancy between the third, s eighth covenants; under the third and sixth, as excepted, the covenantor would be bound t under the covenant to leave in good repair, fire sonable wear and tear are excepted.

Covenant to extensive.

The covenant as to payment of taxes is pe pay taxes too extensive, and imposes an obligation on the les generally is not intended. Municipal corporat power to impose assessments for various purpo instance, for construction of sewers and drainage improvements, and under such a covenant as the lessee might possibly be made to pay such an a (b); a payment which, in short leases at any unlikely is ever intended, for the improvement permanent in its nature, and the whole expen

<sup>(</sup>a) Pheysey v. Vicary, 16 M. & W. 484; Barlow v. Rhoc M. 439. See a difference of opinion as to the effect of these ley v. Hammond, L. R. 3 Ex. 161.

<sup>(</sup>b) See Moore v. Hynes, 22 Q. B. U. C. 107; Michie v. ronto, 11 C. P. U. C. 379; Aldwell v. Hannath, 7 C. P. U. v. Whitworth, L. B. 2 C. P. 326, subsequently referred to see also Sweet v. Seager, 2 C. B. N. S. 119.

payable by twenty or fewer annual instalments, and be of no benefit to the lessee whose lease might be shortly expiring: the annual assessment might be more than the rent.

By the Manchester Improvement Act. 1851, 14 & 15 Vic. ch. 119, the council were empowered to order streets to be sewered and paved by the owners of the adjoining premises, and, in case of default by such owners, to do the work themselves, and to charge the respective owners with their proportionate parts of the expense thereof, to be recoverable by action of debt, &c., and, by way of additional remedy, the council were empowered to require payment from any present or future tenant or occupier, to be levied by distress, and it was made compulsory on the owner to allow such payments to be deducted from the rent. 1863 premises in G. Street were demised by the plaintiff to the defendant for seven years, at the "clear yearly rent" of £90, the latter covenanting that he would "pay and discharge, all taxes, rates, assessments, and impositions whatever (except property-tax) which during the term should become payable in respect of the demised premises." In 1865, the council gave notice to have G. Street sewered and paved. The plaintiff neglecting to do the required work, the council caused it to be done, and assessed his proportion of the expense at 213l. 3s. 6d., which he paid; it was held that, the Payment having been made by the plaintiff, not for a rate. assessment or imposition which had become payable in respect of the demised premises, but for the breach of a duty imposed on him by the Act of parliament, he was not entitled to call upon the defendant under his covenant to re-Pay him the amount. Bovell, C. J., in giving judgment distinguished as to Sweet v. Seager, 2 C. B. N. S. 119. saying, "looking at the language of the covenant in that case, it is almost impossible to conceive how larger words could have been employed. The reddendum there was, Paying a certain yearly rent, 'without any deduction whatsoever in respect of any taxes, rates, assessments, impositions, or other matter or thing whatsoever then already or thereafter to be taxed, assessed, and imposed upon or in

respect of the said premises, or any part thereof, by thority of parliament, or otherwise howsoever: and covenant, that the tenant should 'pay, bear, and discl all such parliamentary, parochial, and county, district. occasional levies, rates, assessments, taxes, charges, im tions, contributions, burthens, duties, and services wh ever as during the said term should be taxed, assessed imposed upon, or in respect of, the said premises the demised, or any part thereof.' All the Judges, in de with the case, refer to the very large and compreher language of the covenant. The words, 'burthens,' 'du and 'services,' are especially relied upon. J., says: 'It clearly was the intention of the original l lord, and also of the lessor, that the tenant should bea landlord harmless against all charges of a general character imposed upon or in respect of the pren And Creswell, J., lays stress upon the evident intentic the parties that the lessor should receive a certain wholly independent of 'any taxes or assessment of e description or upon any account.' Regard being had t language and the general object of the Statute, and to restricted terms of this covenant, I am clearly of opthat the payment in question must fall upon the land and that the tenant is not liable" (a).

Does the agreement that the lessor view extend to his reprehis assigns?

As regards the covenant giving license to enter view state of repair it reads thus: "it is agreed th may enter and shall be lawful for the lessor and his agents to enter. and the Statute declares that where the premise sentatives and of a freehold nature, the covenant shall be taken as: with the heirs and assigns of the lessor, and if of a l hold nature, with his executors, administrators and as: But the covenant, and the power given by, or subject ter of, the covenant, are quite distinct, and it by no n follows that because the lessee covenants with the le his heirs and assigns, that the lessor may enter, that t fore his assigns may: the wide distinction between parties with whom the covenant is made, and the pr to whom a power may be given by such covenant, will be nore apparent by supposing the case of a covenant with he lessor and his heirs and assigns that some third person night enter, where clearly neither the lessor, his heirs or ssions, could enter. The view that the heirs and assigns of the lessor cannot enter under the covenant given by the Act is also favored by the fact, that as to the agreement and proviso for re-entry on breach of covenants on which he lessor is to have power to re-enter, the Act expressly leclares that the proviso and agreement shall apply to the heirs and assigns of the lessor. The only principle under which the benefit of the license can be extended to assigns is, that it appertains to the land, and goes with the revergion, and that as the benefit of covenants as to acts agreed to be done by the lessee directly affecting the land will go to assignees of the lessor, though not named, so also will it be as to acts agreed to be permitted to the lessor to be exercised on the land.

For somewhat the same reasons, the covenant against Covenant not alienation is defective as not extending to restrain the to assign not sufficiently executors administrators and assigns of the lessee. The extensive. only effect of the covenant as it now stands is, that the lessee agrees with the lessor, his heirs and assigns, or executors, administrators and assigns, that he, the lessee. will not assign, &c. (a). It is framed on the supposition that according to Dumpor's case, if once license were given, the benefit of the condition of re-entry on future assignment without leave is gone, the condition being destroyed (b), and therefore that it would be useless to attempt to carry the restraint beyond the lessee. Admitting that on license given before the Act of 29 Vic. ch. 28, the right of re-entry was gone forever, there were still cases under which the estate would pass without license, by act of law, as to personal representatives, to a purchaser under execution, and to assignees in bankruptcy: and it appears that such representatives, or a purchaser under

<sup>(</sup>c) Paul v. Nurse, 8 B. & C. 488, per Bailev. J. (b) Ante pp. 5, 6. 15

execution, and a purchaser from assignees in bankruptcy, would be within the covenant, if it were not confined to the lessee. Again it would seem that mere waiver of a breach would not have destroyed the right of entry on subsequent breach (a). Since the Act of 29 Vic ch. 28, no license thereafter will destroy the right of re-entry, which is preserved for operation on future breaches, and this is an additional reason why the covenant should include personal representatives and assigns. The operation of the covenant as given by this Act, and the effect of waiver and of license, are fully considered in treating of the Stat. 29 Vic. ch. 28, secs. 1, 2 & 3, to which the reader is referred.

<sup>(</sup>a) Ante pp. 7, 8.

## Descent of Freehold Estates of Inheritance (a).

As the Statute of Victoria, which governs descent at the The Act of present day, does not apply to estates tail, nor by section Vic. does not extend to es-41 to "any limitation of any estate by deed or will, or any tates tail, or estate, which although held in fee simple, or for the life of estates held in another, is so held in trust for any other person," and as 8.46 gives also by section 46, preference on partition and division into preference to shares is given to the person who would have inherited the old law. under the former law, it will be requisite to give a brief sketch of that law. It will be found also that for some years to come, and until by possibility of the application of the Statute of Limitations to titles, by which after the prescribed period of possession, a "parliamentary conveyance" (b) is in effect made to the possessors as against the true owners, and the necessity of tracing out old descents superseded, that a knowledge of the former law is absolutely requisite in dealing with real estate. the present day, as many contested cases of descent are governed by the Statute of William as by that of Victoria, and the former Act cannot possibly be understood without a knowledge of the common law rules, which indeed. were left partially in force by the latter Act.

Of the devolution of estates less than freehold it is not Proposed to treat, as they now are and have always been subject to laws of descent different from those applicable to freehold estates, they being mere chattel interests and devolving in cases of intestacy, on the personal representa-

<sup>(</sup>a) In treating of descent at common law, the author has borrowed much from the text of Blackstone. The Statute of William cannot be moderate of without an appreciation of the common law rules, and the remarks of the learned Commentator on the civil law, and on the rules of computation of consanguinity are of service in considering the present law of descent under the Act of Victoria.

<sup>(</sup>b) Per Parke, B. Doe d. Jukes v. Sumner, 14 M. & W. 39.

As will however be seen in the sequel, the Statut 14 & 15 Vic. ch. 6, has much lessened the wide distinction theretofore existing as to the descent of the two classes of estates, and assimilated to some extent the descent of freehold estates to that of chattel interests

1. The various kinds of estates.

The subject may be discussed. 1st. As regards the varimodes or descentage ous kinds of freehold estates; inasmuch as each kind is to the various subject under certain, circumstances to a different law of descent from the others.

2. And at va-& 15 Vic. c. 6.

2nd. As regards the particular time at which the desvious periods, cent takes place; inasmuch as there are three distinct mon law; un-periods or epochs in each of which descent would be traced der Stat. 4 der Stat. 4 Wm. IV. c. 1: in a mode different from the others, viz., that when the under Stat. 14 common law prevailed; that when the Statute 4 Wm. IV. ch. 1, prevailed; and lastly, that since 14 & 15 Vic. ch. 6.

The various kinds of fresholds

In respect of the first division of the subject, it may be mentioned that of the various kinds of freehold estates, some are not of inheritance; thus tenant in dower, by the curtesy, in tail after possibility of issue extinct, are manifestly determined by the death of the tenant, and so not of inheritance; and in the books estates in fee simple and in fee tail are usually named as the only two freehold estates of inheritance; but for the purpose of this chapter at any rate, it will be requisite to conside a third class, viz., estates pur autre vie, as quasi estates inheritance. It is therefore these three classes only freehold estates that will be treated of, as indeed being t only freehold estates to which the law of inheritance applicable; and as before mentioned, under certain c= cumstances, each varies as regards its descent; thus estate in fee tail, being excluded from the 14 & 15 Vic., governed by the common law rules of descent, as modifiby the 4 Wm. IV., and descends therefore differently from a fee simple; whilst an estate pur autre vie, which de cended prior to 14 & 15 Vic., sometimes went to the heize and sometimes under the Statute of Frauds to the exectors; and thus varied in its descent from either a F simple or a fee tail, as will be more fully explained her after.

The necessity for the second division of the subject The law varies arises from the fact that there are three distinct periods, during three periods. during each of which the law of descent was different from that in the others, as above mentioned, viz.: 1. The period from the time when feuds first became hereditary down to the 1st of July, 1834, (the time of the operation of the 4 Wm. IV.), a period during which the common law alone 2. The period from the operation of the 4 Wm. IV., 1st July, 1834, to the 1st January, 1852, when the 14 & 15 Vic. came into effect. 3. The period from 1st January, 1852, since which time primogeniture is abolished, as also the preference of males to females, and of children of the whole blood to those of the half blood, and other important changes made; and the more effectually to supersede the old law, a provision is made that in case of failure of leirs under the rules for ascertaining them given in the Statute, the estate shall go to the next of kin, as under he Statute of Distributions of personal estate.

It will be previously necessary to state, as briefly as Of degrees of ossible, the true notion of kindred or alliance of blood, consanguinity. ineal and collateral; and for this purpose, as also for the urpose of illustrating descent at common law, the author Is either lineal lopts the language of Mr. Justice Blackstone in his comentaries on the law.

"Lineal consanguinity is that which subsists between Lineal consanrsons, of whom one is descended in a direct line from guinity. e other, as between John Stiles (the propositus in the ble of consanguinity) and his father, grandfather, greatandfather, and so upwards in the direct ascending line; between John Stiles and his son, grandson, great-grandn, and so downwards in the direct descending line. very generation in this lineal direct consanguinity, conitutes a different degree, reckoning either upwards or lownwards; the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore

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> universally obtains, as well in the civil and canon. in the common law.

Of collateral kindred.

Collateral relations agree with the lineal in this, that they descend from the same stock or ancestor, but differ in this, that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from One and the same ancestor, who is the stirps, or root, the stirpes. trunk, or common stock, from whence these relations are branched out. As if John Stiles hath two sons, who have each a numerous issue: both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them consanauineos.

The method of common law which followed the canon

The method of computing these degrees of consanguinity computing the (a) in the canon law, which our (common) degrees of consanguinity at adopted (b), is as follows:—We begin at the common ancestor and reckon downwards: and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus Titius and his brother are related in the first degree, for from the father to each them is counted only one; Titius and his nephew are related in the second degree, for the nephew is two degrees removed from the common ancestor, viz., his own grandfather, the father of Titius. Or (to give a more illustrious instance from our English annals), King Henry the Seventh who slew Richard the Third in the battle of Bosworth, was related to that prince in the fifth degree. the propositus therefore in the table of consanguinity, represent King Richard the Third, and the class marked (e) King Henry the Seventh. Now their common stock or ancestor was King Edward the Third, the abavus in the same ta lok; from him to Edmond, Duke of York, the proavus, is degree; to Richard, Earl of Cambridge, the avus, two;

<sup>(</sup>a) See post p. 134.

<sup>(</sup>b) Co. Litt. 23, 24,

chard. Duke of York, the pater, three; to King Richard e Third, the propositus, four: and from King Edward e Third to John of Gaunt (a) is one degree; to John Earl Somerset. (b) two: to John. Duke of Somerset. (c) ree: to Margaret. Countess of Richmond. (b) four; to ing Henry the Seventh, (c) five; which last mentioned ince, being the farthest removed from the common ck, gives the denomination to the degree of kindred in e canon and municipal law. Though according to By the civil e computation of the civilians, (who count upwards from her of the persons related, to the common stock, and en downwards again to the other, reckoning a degree each person both ascending and descending.) these two inces were related in the ninth degree; for from King chard the Third to Richard. Duke of York, is one deee; to Richard, Earl of Cambridge, two; to Edmond, uke of York, three; to King Edward the Third, the mmon ancestor, four; to John of Gaunt, five; to John, arl of Somerset, six: to John, Duke of Somerset, seven: Margaret, Countess of Richmond, eight: to King Henry e Seventh, nine."

The mode of calculating the degrees of proximity in the As to personollateral line, for the purpose of determining what par-civil law. es are entitled, under the Statute of Distributions, (22 & 3 Car. II, ch. 10,) to shares of the personal estate of an instate, is not the mode of the canonists adopted by the ommon law in the descent of real estates; but with one xception, conforms to that of the civilians (a). The exeption is this: according to the civil law, the brother and with one exhe grandmother of an intestate stand in equal degrees of ception. finity to him; and the grandmother, as being in the lineal scending line, was by that law preferred to the brother r any other in the collateral line; but according to the onstruction put by our courts upon the Statute of Distrioutions, (in this instance conforming to the canon law), he brother, as making title immediately from his deceased

<sup>(</sup>a) See post p. 134.

brother, is preferred to the grandmother, who could only claim mediately through the father of the deceased.

Descent under ship.

It will be seen in the sequel that the right of inheritance St. of Vic. governed by the under the Statute 14 & 15 Vic. is with reference to proxerned by the under the Statute 14 & 15 Vic. is with reference to proxerned by the under the Statute 14 & 15 Vic. is with reference to proxerned by the under the Statute 14 & 15 Vic. is with reference to proxerned by the under the Statute 14 & 15 Vic. is with reference to proxerned by the under the Statute 14 & 15 Vic. is with reference to proxerned by the under the Statute 14 & 15 Vic. is with reference to proxerned by the under the Statute 14 & 15 Vic. is with reference to proxerned by the under the Statute 14 & 15 Vic. is with reference to proxerned by the under the Statute 14 & 15 Vic. is with reference to proxerned by the under the Statute 14 & 15 Vic. is with reference to proxerned by the under the Statute 14 & 15 Vic. is with reference to proxerned by the under the Statute 14 & 15 Vic. is with reference to proxerned by the under the Statute 14 & 15 Vic. is with reference to proxerned by the under the statute 14 & 15 Vic. is with reference to proxerned by the under the statute 14 & 15 Vic. is with reference to proxerned by the under the statute 14 & 15 Vic. is with reference to proxerned by the under the statute 14 & 15 Vic. is with reference to proxerned by the under the statute 14 & 15 Vic. is with reference to proxerned by the under the statute 14 & 15 Vic. is with reference to proxerned by the under the statute 14 & 15 Vic. is with reference to proxerned by the under the statute 14 & 15 Vic. is with reference to proxerned by the under the statute 14 & 15 Vic. is with reference to proxerned by the under the statute 14 & 15 Vic. is with reference to proxerned by the under the statute 14 & 15 Vic. is with reference to proxerned by the under the statute 14 & 15 Vic. is with reference to proxerned by the under the statute 14 & 15 Vic. is with reference to proxerned by the under the statute 14 & 15 Vic. is with reference 15 Vic. is with the under the statute 15 Vic. is with the under the under the under the under the under th civil law as re- imity of relationship, more in accordance with the civil gards proximity of relations than the canon law mode of computation.

> The above will be plainer by examination of the table of consanguinity annexed, wherein all the degrees of collateral kindred to the propositus are computed, so far as the tenth of the civilians and the seventh of the canonists inclusive: the former being distinguished by the numeral letters, the latter by the common cyphers.

## DESCENT AT COMMON LAW.

I. Estates person last seised, but never

1. The nirst rule is; that inheritances shall lineally shall lineally descend to the issue of the person who last died actually issue of the seised, in infinitum: but shall never lineally ascend.

Under the Statutes of William as 18, and Victoria (sa lineally ascend 27, 28, lineal ancestors are admitted to the inheritance immediately after failure of lineal descendants; but under the latter Act the privilege is confined to the immediate ancestors; and the common law rule as to necessity of actual seisin is abolished, ss. 4, 8, 14, 23...

The accestor must have had actual seisin.

No person at common law can be properly such an ancestor, as that an inheritance of lands or tenements can be derived from him unless he hath had actual seisin (a) of

Actual seisin

a What constitutes actual seisin, or possession in deed, as distinguish distinguished ed from seisin in law, or constructive possession, is a question of imporfrom seisin in tance, not merely as regards tracing descent at common law, but also in respect of qualification as tenant by the curtesy and in trespass.

Notwithstanding s. 5 of Con. Stat., c. 82, dispensing with proof of entity by the heir in order to prove title in him, or any one claiming by of through him. (a provision which, as observed in treating of that section is unnecessary as regards descent under the Stat. of Wm.), actual entity. or what is equivalent thereto as explained in the text, is still requisite 10 constitute actual seisin so as to enable the husband of the heiress to take as tenant by the curtesy; Wigle v. Merrick. 8 C. P. U. C. 307, per Hagarty, J., and per Draper, C. J., 318, 319; 1 Inst., 29a. Under the like circumstances of want of actual seisin, the heir was not at common law a good stock of descent actual seisin, the heir was not at common law a good stock of descent actual seisin, the heir was not at common law a good stock of descent actual seisin, the heir was not at common law a good stock of descent actual seisin, the heir was not at common law a good stock of descent actual seisin, the heir was not at common law a good stock of descent actual seisin, the heir was not at common law as good stock of descent actual seisin and the seisin se mon law a good stock of descent as explained in the above and following pages.

ands, either by his own entry, or by the possession of vn or his ancestor's lessee for years, or by receiving om a lessee of the freehold, or unless he hath had

are of a conveyance under which the grantor took back the estate elf or his heirs, and the manner in which the Statute of William the common law rules in such cases, is treated of in the text, pp.

ses other than those of descent there would seem to be some diffi. The possesdetermining to what extent a person is to be deemed in possession, sion acquired ous purposes, as to qualify the husband to take by the curtesy, or under the St. e such person to maintain trespass, when the conveyance operates of Uses, to ie Statute of Uses. Thus, would the wife be considered as having take by the mally seised, or in actual possession (mere seisin in law, or concurresy, or possession, of course not being sufficient) so as to enable her maintain tresto take as tenant by the curtesy? 1st, where she took by way pass, &c. in and sale, the bargainor never having been in possession—2nd, ne grantor was or was not in possession, and he conveyed to the statutory grant, or common law conveyance, to a grantee to taking as cestui qui use.

uestion is, whether in the above cases the Statute of Uses confers sion equivalent to actual seisin, or actual possession, within the niring such in the case of a claimant by the curtesy. ever may be the case where the bargainor has had actual possesl as regards the cases above mentioned, the author submits the g, as reasons why in neither case the husband can take by the in other words, why the wife is not to be deemed to have had isin in deed. He does this with great diffidence, because a ree would seem to shew that in either case there would be actual once an analogy be established of seism of a rent charge, and poreal hereditament by force of the St. of Uses.

t case (Heelis v. Blain, 18 C. B. N. S. 90, 11 Jur. N. S. 18), the was whether a cestui qui use, one of the sons of S. Heelis, was to vote under the Reform Act, 2 Wm. 4, c. 45, as having been actual possession of " a share in a rent-charge for six months 31st July, 1864. The rent-charge was originally created by lease and release, and was thereafter conveyed to S. Heelis in fee. s had granted the same to J. H., and his heirs to the use of the s of him S. Heelis, in fee as tenants in common. The first rent he cestuis qui use was in July. It was objected that the cestuis and not had "actual possession" for six months prior to July,

rere not entitled to vote.

conceded that apart from the effect of the Statute of Uses, no isin in deed or possession could be considered as had by the comby the cestuis qui use till receipt of the rent; but the Court held. Statute gave "the cestui qui use possession immediately on the n of the deed creating the use," and that "the Legislature inhe same meaning to the word possession in the Statute of Uses, to the words actual possession in the Reform Act."

inguage of the Statute of Uses is, that the person who has the all from thenceforth stand and be seized, deemed and adjudged l seisin, estate, and possession of and in the same lands, rents, all intents, constructions and purposes in the law, of, and in e estates as they had or shall have in the use, trust or confidence

what is equivalent to corporal seisin in hereditaments that are incorporeal, such as the receipt of rent, a presentation to the church in case of an advowson, and the like. And

of, or in the same, and that the estate, title, right and possession that was in such person or persons, that were, or hereafter shall be seized of any lands, tenements, or hereditaments to the use, confidence or true of any such person or persons, or of any body politic, be from thenceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have such use, confidence or trust after such quality, manner, form and condition as they had before, in, or to the use, confidence or trust that was in them."

Considering the language of the Statute it is difficult to understand how if the person seised to the use has not the actual possession or seisin in deed, but merely constructive possession, or seisin in law, the cestui qui use can take any more, or greater "estate, title, right or possession." It is old and well known law that the seisin of grantee to uses must be commensurate with, and sufficient to rerve the uses declared. Thus, on a common law conveyance to A to the use of B and his heirs, B can take no fee, but a mere estate pur auter vie for want of seisin in fee in A to serve the use. So also it must follow that if A takes no actual seisin in deed, B can take none.

In the principal case John Heelis, the grantee to uses, never had actual seisin, or actual possession, therefore there was none such that could be "deemed and adjudged to be in him or them" that had the

use. See the language of the Act, p 90, in the text.

Conceding at present that on a conveyance of a corporeal hereditement by way of bargain and sale, or covenant to stand seised, "the possession that was in such person" shall be "deemed and adjudged to be in him" who has the use, viz, the bargainee or covenantee, so as to invest him with the actual seisin or possession of the bargainer, or covenantor, by force of the Statute, still in the principal case the Statute did not apply at all in favor of John the grantee to uses, for the conveyance was by way of grant, operating at common law only, and he therefore had at most mere seisin in law. It is clear that on a common law conveyance as a grant of a rent charge, or a release in fee of land to one who has a vested estate, but no possession, as also on a conveyance of the immediate freehold in land by way of Statutory grant under Con. Stat. c-90. no actual seisin in deed or possession, by mere force of the conveyance only, vests in the grantee or releasee; and in case of a grant it would make no difference that the grantor was in possession at the time of grant; in none of these cases will the grantee or releasee by virtue only of his conveyance, and without entry, or some act equivalent to seisin or entry, be invested with more than constructive possession, or seisin in law. See the authorities given hereafter.

In Heelis v. Blain, the distinction was not adverted to between a conveyance operating, by way of bargain and sale, or covenant to stand seised, on the seisin of the bargainer or covenanter, so as to draw out of him and vest in the bargainee or covenantee the possession of the former by force of the Statute, and between a conveyance operating at common law, vesting in the grantee no actual seisin or possession, and consequently none that can be "deemed and adjudged to be in him?" that has the use; and the cases referred to do not appear to controvert this distinction, or establish more than that as to which the Statute is clear and pre-

e all the cases governed by the common law rules, 1 the supposition that the deceased (whose inheri-3 claimed) was the last person actually seised

hat "the estate, title, right and possession" whatever it may person seised to uses shall be "adjudged to be in him" who e. The cases do not shew what was virtually held in Heelis v. t a cestui qui use can take a possession exceeding in quality that intee to uses, though they may indicate that the estate and session of one seised to an use may be executed by the Act so st his cestui qui use with the same actual possseison, as in the bargain and sale, or covenant to stand seised. ter proposition even has been denied on principles and reasoning incontrovertible. The following remarks of two very eminent erty lawyers are to the purpose: Mr. Preston (on Conv. vol. 2, treating of the conveyance by way of lease and release, alludes se taking effect not at common law, but (as usual on this mode ance) under the Statute of Uses as a bargain and sale for a year, ves the following ordinary language of such a lease, and his hereon, thus: "To the intent, that by virtue, &c., the said A. B. ). may be in the actual possession of the premises, and be sabled to accept a grant and release, &c. (as before), to the uses, rusts, and for the intents and purposes to be declared by an indenly prepared, and intended to bear date, &c., and to be made, &c." clause calls for one observation, it follows the language of pracsuming the object to be, to put the lessee in the actual possesis expression, and the practice on which it is grounded, must tood as a reference to the operation of the Statute for transes into possession. By possession, is meant only estate. case for a year, or bargain and sale, cannot, by its own operation, e lessee or bargainee the actual possession. It accomplishes nore than to give him an actual estate. • • Though the barsale may be by a person who has the possession, the possession e changed without an entry by the lessee or bargainee, even when in and sale is to be from a day which is past, or henceforth, &c. ommon law the lessee had not any estate till entry: under in and sale he has an estate immediately on the execution of in and sale, and before entry, provided the bargain and sale is om a day past, or from the execution. But the bargainee cantain an action of trespass, or be considered as in the actual 1 of the land, until he has entered by virtue of the bargain and

every disposition to encourage an observance of established is to be lamented that any expression should have been adopted r any other instrument, which might lead the student to an a conception of the true meaning of the expressions which are me other expression, showing that the lessee was to have an ested estate, as contradistinguished from an actual possession, re more adequately described the object of the lease for a year, bly might have been a protection against those errors into which students, but even men of extensive knowledge in the profession, undertaken to write on the subject of this assurance, have been w just is the maxim, ignoratis terminis, ignorative et ars, and maxim, nomina si perdas certe distinctio rerum perditur."

As to taking by purchase. It is necessary here, however, to call attention to the case of the ancestor taking by purchase (a) without ac-

Mr. Hayes (Vol. 1, 5 ed., p. 78,) follows, and approves of the law as given above by Mr. Preston, he says. "When the lessee was said to be in the actual possession under the bargain and sale for a year, it was meant only that he acquired, by the mere execution of the instrument, such an estate in the land as rendered him capable of accepting a release of the remainder or reversion.

"Even where the bargain and sale was made by the immediate free-holder, the bargainee was not, by force of the Statute, invested with the actual possession in fact of the land, nor could he maintain trespass till he had entered. By actual possession, therefore, we are to understand such an estate in the land as admitted of enlargement by way of release; and, generally, by the term possession, when that term is employed in treating of uses as they were affected by the Statute, nothing more is to be understood than that the Statute annexed to the use a commensurate

legal interest."

Authorities.

The authorities bear out the views of the learned writers above mentioned, and some of them go the length of shewing that the cestui qui use before entry cannot even maintain trespass. Some of these cases also shew the effect of constructive possession, or seisin in law; per Bridgman, C. J. Carter, 66; Barker v. Keate, 2 Mod. 249; Ford's case, 11 Rep. 41; Plowd., 301; Noy., 73; Lutwich v. Mitton, Cro. Jac. 604; Com. Dig. Trespass B, 3; Perry v. Bowes, 1 Vent, 360, doubtful; Turner v. Cameron's Co., 5 Ex. 932; Litchfield v. Ready, 5 Ex. 939; Barnett v. Earl Guilford, 11 Ex. 19; Bullen & Leake, Prac. Plg., 3 Ed. 417; Saunders on Uses, Vol. 2, p. 45; Wigle v. Merrick, 8 C. P. U. C., 332, per Hagarty, J.; Doe Cuthberston v. McGillis, 2 C. P. U. C., 147; Mahar et ux. v. Fraser, 17 C. P. U. C., 408: see, however, Orser v. Vernon, 14 C. P. U. C., 587; Ball v. Young, 8 C. P. U. C., 231; as to cases of vacant possession see per Sullivan, J., in Doe d. Cuthbertson v. McGillis, 2 C. P. U. C., 147.

Result.

The result would appear to be that on a conveyance operating to pass the estate at common law, as on a grant from the Crown, or release, or a statutory grant under Con. St. c. 90, which passes the immediate freehold without aid of the St. of Uses, the grantee or release till entry, or its equivalent, has but seisin in law or constructive possession, and consequently if uses are declared on the seisin of the grantee or release, the cestui qui use can take no more. That on a bargain and sale, or coverant to stand seised, where the bargainor or covenantor never had actual possession, the bargainee or covenantee will not by more force of the conveyance, without entry, or its equivalent, be considered as taking more than constructive possession, or seisin in law, not sufficient to qualify the husband to take as tenant by the curtesy: whilst as regards the right to maintain trespass the authorities conflict. As to cases of conveyance by a bargainor or covenantor who had actual possession, the authorities, considering Heelis v. Blain and the cases there referred to, also conflict regards the question whether the bargainee or covenantee is to be considered as taking the actual possession of the party conveying. As regards the heir, entry would still seem to be requisite to give more than seisin in law.

(a) As to taking by purchase, and the alterations made in the common law sense thereof by the Acts of Wm. & Victoria, see PP-143, 151; see also Blackstone's Com. by Leith, p. 175.

ning actual seisin, in which case he would still be a At common law, strictly speakod stock of descent. g there could be no such case as acquisition by purchase an immediate freehold without acquisition of seisin; for eusual conveyance by feofiment was only perfect by livery seisin, and if the conveyance were by release it required ssession in the releasee. At common law, therefore, the uchaser of an immediate estate of freehold being always ised the canon as above expressed that descent was to seed from the person last seised, required no modification as regarded purchasers. But when after the first non was established, conveyances by devise under the atute of Wills, and by way of use under the Statute of es were allowed in modes unknown to the common law. unsferring the estate without livery or actual seisin, then examon required, and is to be considered, to be modified, to et the cases of purchasers taking by devise or by way of without acquiring actual seisin. Otherwise by strict ral application of the above canon, the devisee or cestui i use, who never entered, would not be a good stock of cent; for as before shewn (a) the possession acquired mere force of the Statute of Uses is but a constructive session, and gives no actual seisin as distinguished from sin in law. The author apprehends, on the authorities ore referred to (b), that the true rule where the ancestor k under a conveyance to uses is, not that he thereby juired actual seisin, but that as he took as purchaser, he a good stock of descent, on the principle before referred

That this is so, is shewn by the fact that a devisee need tenter or acquire actual seisin to enable his heir to deve title from him, and the decisions are on the ground at he takes as purchaser (c); in such case there could be aid by the Statute of Uses as to possession. For the me reason the cestui qui use taking as purchaser, need tacquire actual seisin. In case the ancestor takes by whether the may be capable of transmitting the property

<sup>(</sup>c) See note, p. 120, as to actual seisin. (b) Supra p. 120, n. a. (c) Doe d. Parker v. Thomas, 3 M. & G. 815.

so taken to his own heirs, without an actual possession in himself (a).

"The seisin therefore of any person, thus understood, makes him the root or stock, from which all future inheritance by right of blood must be derived; which is briefly expressed in this maxim, seisina facit stipitem.

When therefore a person dies so seised, the inheritance first goes to his issue: as, if there be Geoffrey, John and Matthew, grandfather, father and son; and John purchases lands, and dies; his son Matthew shall succeed him as heir, and not the grandfather Geoffrey, to whom the land shall never ascend, but shall rather escheat to the lord." And thus if a man died seised in fee, leaving no issue or brothers or sisters, but leaving his father and an uncle, the brother of his father, the uncle took; the father being prohibited from taking, as his doing so would have been a lineal ascension he was passed by, and gave place to the collateral and more distant relative, the uncle; but upon the death without issue of the uncle, (he having acquired actual seisin), the estates son, but to his brother, the uncle of the original purchase.

Instances of difference between tracing from person last seized and last entitled.

It may be well to illustrate the distinction between tracing from the person last seised, and from the person last entitled (b). The difference was sometimes important; and it will be seen in the case put below, if the person last entitled did not acquire seisin, the inheritance sometimes descended to a person different from him, who would have taken if seisin had been acquired. Thus, if (see 1st Table of Descents) Geoffrey had been the person last seised. and died intestate, and his sons, John, Francis, and Oliver, on his death, become successively entitled, as issue by the first wife, and died without becoming seised, and without issue; here the son of Geoffrey by the second wife, of the half blood to Oliver the person last entitled, would have taken as next heir to Geoffrey, the person last seised, in preference to Bridget and Alice, the sisters of the whole blood of the person last entitled.

<sup>(</sup>a) Watk. Desc., p. 32.

<sup>(</sup>b) See also post p. 146.

descent has to be traced from Geoffrey as last seised, not from Oliver as last entitled; and by force of the 2nd rule, the son of Geoffrey shall be preferred to his daughters: but if either John, Francis, or Oliver had obtained seisin, then descent must have been traced from him who was last seised and his sisters of his whole blood would have taken in preference to his brother of the half blood. Indeed, as afterwards explained, in such case the half-brother, under 40 circumstances could ever have taken, and if other heirs were wanting, the estate would escheat.

In the case of a remainder or reversion in fee, subject to In cases of deand preceded by a life estate, as the seisin was in the mainder or remainder or retenant of the freehold, and not in the remainder-man or version depenreversioner, it followed that on death of such remainder-dent on life man or reversioner, and consequent descent of his estate to his heir, the party claiming the estate on death of such heir pending the life estate, could not take such intermediate heir as the stock of descent, as such heir never acquired seisin: but the stirps would have been, in case of a remain-descent to be der, the purchaser of such estate or, in other words, the traced from person to whom it was first granted; and in case of a reversion, the person by whom it was first created by grant of the particular estate preceding it (a). But if the reversion or remainder were not dependent on an estate of freehold. but for years, here the possession of the tenant being that of the remainder-man or reversioner, and the interest of both but one estate in law, the intermediate heir would be considered as having acquired actual seisin by the possession of his tenant for years, and so would constitute a new stock, from whom descent would be traced, instead of from his ancestor, and the rule would be the same even though the unless the an-Particular estate were for life, if the intermediate heir in re-cestor had exercised acts of mainder or reversion, in his lifetime exercised acts of owner-ownership. ship over his estate, as by making a lease for life, or by conveying to another in fee to the the use of the grantor and his heirs. Any such act of ownership was deemed equivalent to acquiring seisin (and in fact was such, as nearly as the nature

<sup>(</sup>a) Hayes Conv. vol. 1, 3 ed. p. 313.

of the case would admit of), and constituted the agent a new

stock of descent as seized within the scope of this first canon. The case put above shows the importance of these acts, and the acquisition of seisin thereby, and that, according as it was or was not acquired by the intermediate heir, would his brother of the half blood take or be rejected as his heir. When it is said the acts of ownership above instanced would constitute the agent a new stock of descent, the remark must be understood as confined expressly to the operation of the first canon: that is, he will be considered as having become seised for all purposes of application of that canon, but he will not be considered as having become a purchaser within the meaning of the 5th and 7th canons, hereafter referred For (as subsequently explained in considering as, 5 & 6 of the Consolidated Statute of William, which alter this common-law doctrine) (a) a mere conveyance to uses, whereby the estate revested, as before, in the conveying party and his heirs, was wholly nugatory at common law so far as regarded the making such party and his right heirs take by purchase: the right heirs at common law would be deemed as in, of their old or former estate. Thus if in the table of descent at common law. Lucy Baker being seised at fee, had demised for life, leaving a reversion in herself in fee, which descends on her death to her eldest son John by her first husband, and after, on his dying without issue, to his brother Francis, and after, on his dying without issue, to his brother Oliver; now if Oliver, being so entitled, should, by conveyance to uses, convey to another in fee, to the use of himself and his heirs; although the effect would be, as above stated, to constitute a seisin in him, so as to cause him to be a new stock of descent and thus admit as next heirs, on his death without issue, his sisters of the whole blood, Bridget and Alice, in preference to his half-brother, son of Lucy by her second husband; still the effect of the conveyance would not be to constitute Oliver or his right heirs Bridget, and Alice, purchasers: and so, on the death of Alice and Bridget, and the next

Instance of difference as to persons who would take. taker, their half-brother, son of Lucy, without issue, the reversion would go by the 5th and 7th canons, to the collateral heir of Lucy the mother No. 14, instead of to that of the father Geoffrey No .7. Whereas if, by the conveyance, Oliver or his sisters were to be considered as taking as purchasers, then under the above state of facts, all consideration of descent to them was out of the question, and on their death without issue the reversion would have gone by the 5th and 7th canons to their next collateral heir on the paternal side. If Oliver instead of conveying to uses. as above supposed, had conveved so as to vest the fee absolutely in a stranger, and then have taken a reconveyance of the fee, this would have constituted him a nurchaser. In all that has been said it is presupposed of course that the estate descended is throughout strictly a reversion, i. c., that the life estate is existing during the supposed devolutions of the estate, for otherwise it would be an estate in possession.

II. "The second rule was that the male issue should be 2nd canon: admitted before the female." This rule was so simple male issue preferred to in its application as to require no comment. may be illustrated by a single example: A. dying, left two sons and two daughters: by force of a rule Which we have not yet reached in its order, the eldest son would first have taken; and upon his death without issue, his heir would have been his brother, to the exclusion of his sisters, although the latter may have been older in years than both the brothers.

The true reason, says Blackstone, "of preferring the males must be deduced from feodal principles; for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud, inasmuch as they were inca-Pable of performing those military services for the sake of which that system was established. But our [common] law does not extend to a total exclusion of females, as the Salic law and others, where feuds were most strictly retained: it only postpones them to males; for though daughters are excluded by sons, yet they succeed before any collateral relations."

This canon of no force under St. of Wm.

This canon is not varied, though explained by the St. William (Con. Stat., s. 19), but is entirely disregarded the Stat. of Victoria.

3rd canon: primogeniture equality among females.

III. "The third rule was, that when there were two primogeniture among males; more males in equal degree, the eldest only should inhe but the females altogether." It was upon this canon that t law of primogeniture depended, the eldest son taking. the total exclusion of his brothers and sisters. part of the rule excluded primogeniture among females, a gave the estate among them altogether, as coparceners.

This Canon

The Stat. of William did not vary this canon, but by t abolished under St. of Vic. act of Victoria primogeniture among males was abolished and equal distribution which theretofore prevailed as females only was applied to males and females indiscrimi ately.

4th capon: lineal descendants in resent the ancestor.

IV. "A fourth rule, or canon of descents, is this: that: lineal descendants, in infinitum, of any person deceau infinitum rep-shall represent their ancestor; that is, shall stand in t same place as the person himself would have done had been living."

> "Thus, the child, grandchild, or great-grandchild, eitl male or female, of the eldest son, succeeds before 1 younger son, and so in infinitum. And these represen tives shall take neither more nor less, but just so much their principals would have done. As if there be t sisters, Margaret and Charlotte; and Margaret dies, leavi six daughters; and then John Stiles, the father of the t sisters dies, without other issue: these six daughters sh take among them exactly the same as their mother M garet would have done, had she been living; that is, moiety of the lands of John Stiles in coparcenary; so the upon partition made, if the land be divided into twe parts, thereof Charlotte, the surviving sister shall have and her six nieces, the daughters of Margaret, one a pie

Descent per stirpes.

"This taking by representation is called succession stirpes, according to the roots; since all the branches herit the same share as their root, whom they represe would have done. And in this manner also was the Jew

succession directed; but the Roman (which our present Statute of Victoria more resembles, and exactly so in the following instances) somewhat differed from it. In the descending line, the right of representation continued in infinitum, and the inheritance still descended in stirpes; as, if one of three daughters died leaving ten children, and then the father died, the two surviving daughters had each onethird of his effects, and the ten grandchildren had the remaining third divided between them. And so among collaterals, if any person of equal degree with the persons represented were still subsisting (as if the deceased left one brother, and two nephews, the sons of another brother), the succession was still guided by the roots; but if both the brethren were dead leaving issue, then their representatives in equal degree became themselves principals, and shared the inheritance per capita, that is share and share alike: they being themselves now the next in degree to the ancestor, in their own right, and by right of representation. So, if the ment heirs of Titius be six nieces, three by one sister, two by another, and one by a third; his inheritance by the Roman law, was divided into six parts, and one given to each of the nieces; whereas the common law of England in this case would still divide it only into three parts, and distribute it per stirpes, thus: one third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother."

The Statute of William did not interfere with the fourth Altered by St. canon, but it will be seen hereafter that the above common of Victoria, which conlaw doctrine of descent per stirpes is broken in upon by forms to Rothe Statute of Victoria, and the principle of the Roman man law. law, above mentioned, is adopted; and descent per stirpes or per capita takes place according as the heirs are in equal or unequal degrees of consanguinity.

V. "A fifth rule is, that on failure of lineal descendants V. On failure or issue, of the person last seized, the inheritance shall of lineal descendants of descend to his collateral relations, being of the blood of the person last sekrst purchaser; subject to the three preceding rules."

used, inheritance descends

to collateral relatives, of blood of first murchaser.

Thus, if Geoffrey Stiles purchases land, and it to John Stiles, his son, and John dies seised there issue: whoever succeeds to this inheritance must blood of Geoffrey the first purchasor of this fam

Who is a purchaser at Com. Law ?

The first purchasor, perquisitor, is, at comm who first acquired the estate to his family, wh same was transferred to him by sale or by gift, c other method, except only that of descent (a).

under State. of Wm. & Vic. Statute of William (Con. St. ss. 4.5, 6, and 14.) th taking by purchase is extended: and varied also b of Victoria (Con. St., s. 52.) The Statute of Wi varies this canon in permitting the lineal ancesto and that in preference to collaterals, as is explain sequel.

"When feuds first began to be hereditary, it w necessary qualification of the heir, who would su feud, that he should be of the blood of, that : descended from, the first feudatory or purchasor sequence whereof if a vassal died seised of a fe own acquiring, or feudum novum, it could not a any but his own offspring; not even to his brothe he was not descended, nor derived his blood, from acquirer. The true feodal reason for which rule that what was given to a man, for his personal s personal merit, ought not to descend to any but t his person. But if it was feudum antiquum, th descended to the vassal from his ancestors, then h or such other collateral relation as was desce derived his blood from the first feudatory, might such inheritance."

"However in process of time, when the feudal in part abated, a method was invented to let in teral relations of the grantee to the inheritance, b Foudum novum him a feudum novum to hold ut feudum antique is, with all the qualities annexed of a feud derive ancestors: and then the collateral relations were to succeed even in infinitum, because they m

ut antiquum.

been of the blood of, that is descended from, the first imaginary purchasor: and all grants in fee of an indefinite character were deemed to be of that tenure (a), and therefore collateral kindred of the grantee, or descendants from any of his lineal ancestors admitted, unless in the case of a feetail and there this rule is still strictly observed, and none but the lineal descendants of the first donee (or purchasor) are admitted."

"Yet at common law, when an estate really descended in a When an escourse of inheritance to the person last seised, the strict ed to the perrule of the feodal law was observed; and none admitted, son last seised but the heirs of those through whom the inheritance had of the feodal passed: for all others had demonstrably none of the blood law observed. of the first purchasor in them, and therefore should never succeed. As if lands came to John Stiles by descent from his mother. Lucy Baker, no relation of his father (as such) could ever be his heir of these lands; and, vice versa, if they descended from his father Geoffrey Stiles, no relation of his mother (as such) could ever be admitted thereto; for us father's kindred had none of his mother's blood, nor had is mother's relations any share of his father's blood. And io, if the estate descended from his father's father, George Stiles, the relations of his father's mother, Cecelia Kempe. bould for the same reason never be admitted, but only those of his father's father."

"Here we may observe, that so far as the feud is really Where the antiquum, the common law traces it back and will not antiquum, none suffer any to inherit but the blood of those ancestors, from inherit but whom the feud was conveyed to the late proprietor. But cestors from when, through length of time it can trace it no farther; as whom it was if it be not known whether his grandfather, George Stiles, in-late proprieherited it from his father, Walter Stiles, or his mother, tor. Christian Smith; or if it appear that his grandfather was the first grantee, and so took it (by the general law) as a fend of indefinite antiquity; in either of these cases, the common law admits the descendants of any ancestor of

<sup>(</sup>a) See also Imp. St. 31, Geo. 3, c. 31, s. 43, Con. Stats. Canada.

George Stiles, either paternal or maternal, to be in them due order the heirs to John Stiles of this estate; because in the first case it is really uncertain, and in the second case, it is supposed to be uncertain, whether the grandle father derived his title from the part of his father or his mother."

"This then is the great and general principle upon which the common law of collateral inheritances depends: the upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchasor: or that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by a fiction < law to have originally descended."

"The rules of inheritance that remain are only rules • evidence, calculated to investigate who the purchasiz ancestor was: which in feudis vere antiquis has in proces of time been forgotten, and is supposed so to be in fem. that are held ut antiquis."

VI. Collateral last seised collateral kinsman, of whole blood.

VI. "A sixth rule or canon therefore is, that the collater heir of person heir of the person last seised must be his next collater must be next kinsman, of the whole blood." It will be shewn hereafter that the common law infir-

This rule varied by the acts of Wm. and Vic.

ity of the half blood was partially removed by the Status of William, who, under sec. 21, take after the whole bloo in the same degree, and was almost entirely removed b the Act of Victoria, under which, by sec. 36, except i certain cases, they are placed on the same footing as th whole blood.

The canonical degrees of proximity.

"First, under this common law canon, the heir must t next collateral kinsman, either personally or jure represer tationis; which proximity is reckoned according to th canonical degrees of consanguinity before mentione Therefore the brother being in the first degree, he and b descendants shall exclude the uncle and his issue, who only in the second. And herein consists the true reason. the different methods of computing the degrees of cons guinity (b), in the civil law (to which descent by the Status

of Victoria is most allied) on the one hand, and in the canon and common laws on the other The civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person decased to whom the relation is claimed: it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him: and makes not only his great nephew but also his first cousin to be both related to him in the fourth degree; because there are three persons between him and each of them. The canon law regards consanguinity principally with a View to prevent incestuous marriages between those who have a large portion of the same blood running in their respective veins; and therefore looks up to the author of that blood, or the common ancestor, reckoming the degrees from him: so that the great nephew is related in the third canonical degree to the person proposed, and the firstcousin in the second; the former being distant three degrees from the common ancestor (the father of the propositus), and therefore deriving only one-fourth of his blood from the same fountain; the latter, and also the propositus himself, being each of them distant only two degrees from the common ancestor (the grandfather of each), and therefore having one half of each of their bloods the same. The common law regards consanguinity princi-Pally with respect to descents; and, having therein the me object in view as the civil, it may seem as if it ought proceed according to the civil computation. But, as it respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and there-Fore counts its degrees in the same manner. Indeed, the designation of person (in seeking for the next of kin), will come to exactly the same end, (though the degrees will be differently numbered), whichever method of computation we suppose the common law to use; since the right of reprecentation of the parent by the issue is allowed to prevail in infinitum. This allowance was absolutely necessary, else there would have frequently been many claimants in

exactly the same degree of kindred; as, for instance, v and nephews of the deceased: which multiplicity, th no material inconvenience in the Roman law of pa inheritances, vet would have been productive of er confusion where the right of sole succession, as wit The issue or descendants therefo was established. John Stile's brother are all of them in the first degr kindred with respect to inheritances, those of his unthe second, and those of his great uncle in the thir their respective ancestors, if living, would have been are severally called to the succession in right of such representative proximity."

On failure of last seised, in-

"The right of representation being thus established issue of person former part of the present rule amounts to this: th heritance de-failure of issue of the person last seized, the inheri seends to issue shall descend to the other subsisting issue of his nex Thus, if John Stiles dies without diste ancestor. mediate ancestor. his estate shall descend to Francis his brother, or his 1 sentatives; he being lineally descended from Ge Stiles. John's next immediate ancestor, or father. ure of brethren or sisters, and their issue, it shall de to the uncle of John Stiles, the lineal descendant grandfather George, and so on in infinitum."

Lineal ancestors, though incapable of inheritance. are yet the common stock from which next ancestor must spring.

"Now here it must be observed that the lineal ance though (according to the first rule,) incapable themselv succeeding to the estate, because it is supposed to already passed them are yet the common stocks from . the next successor must spring. But, though the cor ancestor be thus the root of the inheritance, yet it i necessary to name him in making out the pedign descent. For the descent between two brothers is h be an immediate descent, and therefore title may be by one brother or his representatives to or through an without mentioning their common father (a); if Ge Stiles hath two sons, John and Francis, Francis may as heir to John without naming their father Geoffrey

<sup>(</sup>a) This rule is varied by sec. 17 of the Con. St.

so the son of Francis may claim as cousin and heir to Matthew the son of John. without naming the grandfather, viz as son of Francis, who was the brother of John, who was the father of Matthew. But though the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood; and therefore, in order to ascertain the collateral heir of John Stiles, it is first necessary to recur to his ancestons in the first degree: and if they have left any other issue besides John, that issue will be his heir. of such, we must ascend one step higher, to the ancestors in the second degree, and so upwards, in infinitum, till some couple of ancestors be found who have other issue descending from them besides the deceased in a parallel or collsteral line. From these ancestors the heir of John Stiles must derive his descent, and in such derivation the same rules must be observed with regard to sex, primogeniture, and representation, that have before been laid down with regard to lineal descents from the person of the last proprietor."

"But secondly, the heir need not be the nearest kinsman Heir must be absolutely, but only sub modo; that is, he must be the nearest kinsman of whole nearest kinsman of the whole blood; for if there be a much blood. nearer kinsman of the half blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded."

"A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For as every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who hath, so far as the distance of degrees will permit, all the same ingredient in the composition of his blood that the other hath. Thus the blood of John Stiles being composed of those of Geoffrey Stiles his father, and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, hath entirely the same blood with John Stiles; or he is his brother of the whole blood. But if each other.

Half-blood can after the death of Geoffrey Lucy Baker the mother marrie not inherit to a second husband, Lewis Gay, and hath issue by him, th blood of this issue, being compounded of the blood of Luc Baker, (it is true,) on the one part, but that of Lewis Gan (instead of Geoffrey Stiles.) on the other part, it hath there fore only half the same ingredients with that of John Stiles; so that he is only his brother of the half blood and for that reason they shall never inherit to each other. So also, if the father has two sons, A, and B., by different wives : now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other. but the estate shall rather escheat to the lord. if the father dies, and his lands descend to his eldest son A., who enters thereon, and dies seised without issue, still B. shall not be heir to this estate, because he is only of the half blood to A., the person last seised; but it shall descend to a sister (if any) of the whole blood to A.: for, in such cases, the maxim is, that the seisin or possessio fratris facit sororem esse hæredem. Yet had A. died without entry, then B. by force of the first rule might have inherited; not as heir to A. his half brother but as heir to their common father, who was the person last actually seised."

VII. In collateral inheritances male red to female: unless lands descended from a female.

VII. "The seventh and last rule or canon is, that in collateral inheritances the male stocks shall be preferred stocks prefer to the female, (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near.)—unless where the lands have in fact, descended from a female."

Thus the relations on the father's side are admitted in infinitum, before those on the mother's side are admitted at all; and the relations of the father's father before those of plained by St. the father's mother, and so on. This rule is explained of Wm. annul- by sections 19 & 20, consolidating the Act of William Under the Act of Victoria it has no effect.

This rule exled by St. of Vic.

Where lands father's side ted.

Whenever the lands have notoriously descended to a mer descend from mother's side, this rule is totally reversed; and mother's side, this rule is totally reversed; no relation by relation of his by the father's side, as such, can ever be assuch admit- mitted to them; because he cannot possibly be of the blo

of the first purchasor. And so, e converso, if the lands deseeded from the father's side, no relation of the mother, as such shall ever inherit. So also, if they in fact descended to John Stiles from his father's mother Cecelia Kempe; here not only the blood of Lucy Baker his mother, but also of George Stiles his father's father, is perpetually excluded. And, in like manner, if they be known to have descended from Frances Holland, the mother of Cecelia Kempe, the line not only of Lucy Baker and of George Stiles, but also of Luke Kempe, the father of Cecelia, is excluded; whereas, when the side from which they descended is forgotten, or never known, (as in the case of an estate newly purchased to be holden ut feudum antiquum) here the right of inheritance first runs up all the father's side, with a preference to the male stocks in every instance; and if it finds no heirs there, it then, and then only, resorts to the mother's side.

"Before concluding this branch of our inquiries, it may Exemplificanot be amiss to exemplify these rules by a short sketch of these rules. the manner in which we must search at common law for the heir of a person, as John Stiles, who dies seised of land which he acquired, and which therefore he held as a feud of indefinite antiquity (a)."

"In the first place succeeds the eldest son, Matthew Stiles, or his issue: (No. 1.)—if his line be extinct, then Gilbert Stiles and the other sons, respectively, in order of birth, or their issue: (No. 2.)—in default of these all the daughters together, Margaret and Charlotte Stiles, or their issue: (No. 3.)—On failure of the descendants of John Stiles himself, the issue of Geoffrey and Lucy Stiles, his parents, is called in:—viz. first, Francis Stiles, the eldest brother of the whole blood, or his issue: (No. 4.)—then Oliver Stiles, and the other whole brothers, respectively, in order of birth, or their issue: (No. 5.)—then the sisters of the whole blood altogether, Bridget and Alice Stiles, or their issue: (No. 6.)—in default of these, the issue of George and Cecilia

<sup>(</sup>a) See the table of descents.

Stiles, his father's parents: respect being still had to t age and sex: (No. 7.)—then the issue of Walter Christian Stiles, the parents of his paternal grandfat (No. 8.)—then the issue of Richard and Anne Stiles. parents of his paternal grandfather's father: (No. 9.)so on in the paternal grandfather's paternal line, or b of Walter Stiles, in infinitum. In defect of these, issue of William and Jane Smith, the parents of his pa nal grandfather's mother: (No. 40.)—and so on in paternal grandfather's maternal line, or blood of Chris Smith, in infinitum: till both the immediate blood George Stiles, the paternal grandfather, are spent.—1 we must resort to the issue of Luke and Frances Ke the parents of John Stiles's paternal grandmother: (No. -then to the issue of Thomas and Sarah Kempe. parents of his paternal grandmother's father: (No. 1! and so on in the paternal grandmother's paternal lin blood of Luke Kempe, in infinitum.—In default of w we must call in the issue of Charles and Mary Holland parents of his paternal grandmother's mother: (No. 1) and so on in the paternal grandmother's maternal lin blood of Frances Holland, in infinitum: till both immediate bloods of Cecilia Kempe, the paternal gr mother, are also spent.—Whereby the paternal blo John Stiles entirely failing, recourse must then, and before, be had to his maternal relations; or the bloo the Bakers, (Nos. 14, 15, 16,) Willis's, (No. 17,) The (Nos. 18, 19.) and White's, (No. 20.) in the same re successive order as in the paternal line."

If person last inheritance, cestors from not descend never inherit.

In case John Stiles was not himself the purchasor seised took by the estate in fact came to him by descent from his fa the blood of mother, or any higher ancestor, there is this difference: that line of an- the blood of that line of ancestors, from which it die which land did descend, can never inherit: as was formerly fully expla And the like rule, as is there exemplified, will hold descents from any other ancestors.

Explanation of the table.

It should be borne in mind, that during this whole cess, John Stiles is the person supposed to have been

actually seised of the estate. For if ever it comes to vest in any other person, as heir to John Stiles, a new order of succession must be observed upon the death of such heir: since he, by his own seisin, now becomes himself an ancestor or stipes, and must be put in the place of John Stiles. The figures therefore denote the order in which the several classes would succeed to John Stiles, and not to each other: and before we search for an heir in any of the higher figures, (as No. 8) we must be first assured that all the lower classes (from No. 1 to No. 7) were extinct, at John Stiles' decease.

Such were the seven canons referred to by Blackstone as regulating descent at common law; and we now come to consider the changes introduced by Stat. 4 Wm. IV., ch. 1. Con Stat. ch. 82.

## DESCENT UNDER THE STATUTE OF WILLIAM.

CON. STAT. CH. 82, SECTIONS 1, 2, 3, 15 & 16.

- 1. The eighteenth section of the interpretation Act is not to apply to this Act.
- 2. This Act shall not extend to any descent which took place Relation of on the death of any person who died before the first day of July, the Act. one thousand eight hundred and thirty-four. 4 W. 4, c. 1, s. 11.
- 3. The next ten sections of this Act numbered from four to How the next thirteen shall apply retrospectively to the sixth day of March, ten sections one thousand eight hundred and thirty-four, and also prospectively (as the case may be), and shall be construed as if the same had been enacted and passed on the said sixth day of March, one thousand eight hundred and thirty-four. 4 W. 4, c. 1, s. 11.
- 15. The foregoing sections of this Act shall not have operation The foregoing retrospectively to a period of time anterior to the sixth day of sections not to March, one thousand eight hundred and thirty-four, so as, by spectively in force of any of their provisions, to render any title valid, which certain cases. in regard to any particular estate had prior to that day been adjudged, or has been or may be in any suit which was depending on that day adjudged invalid, on account of any defect, imperfection, matter or thing, which is by such Sections altered, supplied or remedied; but in every such case the law in regard to any such

defect, imperfection, matter or thing, shall, as applied to such title, be deemed and taken to be as if those Sections of this Ac had not been passed. 4 W. 4, c. 1, s. 60.

Relation of this Act as to descents be-July, 1884, and 81st De-

16. As respects every descent between the first day of July one thousand eight hundred and thirty-four, and the thirty-fire tween the 1st day of December, one thousand eight hundred and fifty-onboth days included, and as respects any descent not included c cember, 1851. provided for in the Sections of this Act, numbered from twentthree to forty-nine, both included, the following sections num bered from seventeen to twenty-one, both included, shall anuretrospectively to the first day of July, one thousand eige hundred and thirty-four, and also prospectively, as the case m= be, and shall be construed as if the same had been passed on t said first day of July, one thousand eight hundred and thirty-for See 14, 15 V. c. 6, s. 1.

> It may be mentioned as to these sections, that they be best understood by the remark that the original State Wm. IV., ch. 1, was passed on 6th March, 1834, and it is 1 that reason that day is referred to in the Con. Stat.; al. that some of the provisions of the original Act were not take effect till 1st July, 1834, and the Act ceased to app after 31st December, 1851.

## SECTIONS 14 & 4.

Meaning of words in this Act.

14. The words and expressions in the foregoing sections and is the next seven sections numbered from fifteen to twenty-on inclusive, which in their ordinary signification have a more con fined or a different meaning, shall, in all such sections, except where the nature of the provision or the context thereof shall exclude such construction, be interpreted as follows, that is to say: the word "land" shall extend to messuages, and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share o the same hereditaments and properties, or any of them, and any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right o title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, right

Land.

titles and interests, or any of them, shall be in possession, reversion, remainder or contingency; and the words "the pur-Purchaser. chaser" shall mean the person who last acquired the land otherwise than by descent or than by any partition, by the effect of which the land shall have become part of or descendible, in the same manner as other land acquired by descent; and the word "descent" shall mean the title to inherit land by reason of Descent. conanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue : and the expression "descendants of any ancestor" shall extend to all Descendants. persons who must trace their descent through such ancestor: and the expression "the person last entitled to land" shall Persons last extend to the last person who had a right thereto, whether he did entitled. or did not obtain the possession or the receipt of the rents and profits thereof; and the word "assurance" shall mean any deed Assurance. or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and the word "rent" shall extend to all annuities and periodical sums of Rent money charged upon or payable out of any land; and the "person through whom another person is said to claim," shall mean any person by, through or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the courtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee or otherwise : and every word importing the singular number only, Number and shall extend and be applied to several persons or things, as well gender. as to one person or thing; and every word importing the masculine gender only, shall extend and be applied to a female, as well as to a male. 4 W. 4, c. 1, s. 59.

4. In every case, on and after the first day of July, one Descent shall thousand eight hundred and thirty-four, descent shall be traced always be trafrom the purchaser; and to the intent that the pedigree may ced from the purchaser, &c. never be carried farther back than the circumstances of the case and the nature of the title require, the person last entitled to the land shall for the purposes of this Act be considered to have been the purchaser thereof, unless it be proved that he inherited the same, in which case, the person from whom he inherited the same shall be considered to have been the purchaser, unless it be proved that he inherited the same; and, in like manner, the last person from whom the land shall be proved to have been inherited shall

in every case be considered to have been the purchaser, unless i be proved that he inherited the same. 4 W. 4, c. 1, s. 1.

Sec. 4. by requiring descent to be traced from the pur chaser instead of from the person last actually seised makes a most important change in the first canon of descent the first part of which was that "the inheritance should descend to the issue of the person who last died actuall seised:" so that though such person were actually entitles vet if he did not die actually seised, he was passed by E the order of descent, and inheritance had to be traced frosome other actually seised, from whom then the perse claiming as heir was taken to inherit directly. What com stituted actual seisin has been above explained (a): by the Act the common law requirements of seisin is abolished.

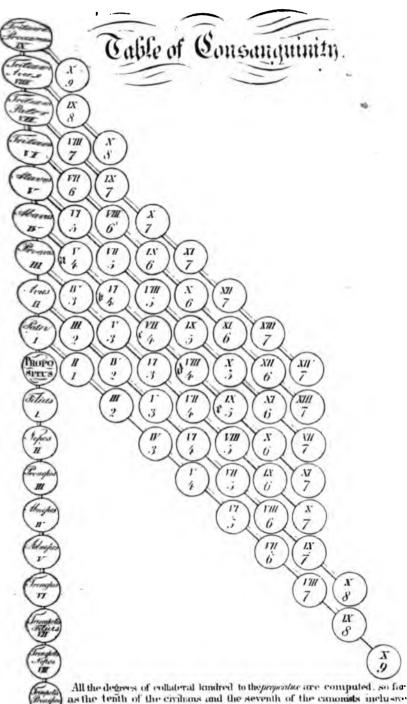
Sec. 14 defines word purchaser,

By sec. 14 the word "purchaser" is declared to me "the person who last acquired the land otherwise than " descent, or than by any partition, by the effect of whi "the land shall have become part of or descendible in \* " same manner as other land required by descent." Th. € latter words as to partition refer to such a case as a par tion by parceners to whom lands have descended; partition by them they shall not be considered as taking purchasers, by reason of such partition. By the effect the statute, therefore, the word "purchaser" has a mu larger scope than in its ordinary acceptation, and wou include all persons who take not only in the strict sen of the word, but by gift, devise, &c., in short, in every oth way than by descent or partition as named in the Statu

The sense and capacity of taking by purchase, is also, contravention of common law rules considerably enlarg by sections 5, 6, 8 and 9, as hereafter explained.

defines also last entitled."

By the same section also the words "the person last € "the person titled to land," shall "extend to the last person who have right thereto, whether he did or did not obtain the posses sion or the receipt of the rents and profits thereof:" by force of the extended signification given to the "land" the act has an equivalent extended effect.



All the degrees of collateral landred to the projective are computed, so for as the tenth of the civilians and the seventh of the canonists inclusive the former being distinguished by the numeral letters, the latter by the common cyploris.

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Cobsered William

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We need not dwell long on the second branch of the Last clause of fourth section, which is that "the person last entitled to bec. 4. the land shall be considered to have been the purchaser thereof, unless it be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it be proved that he inherited the same," and so ad infinitum. As hereafter explained, it shifts the descent sometimes

materially, according to whether the person last entitled did or did not take in any other manner than by descent or partition, as named in sec. 14. The presumption created. that the last person entitled is the purchaser, is to avoid difficulties in the evidence, which would be great if the statute provided simply that descent should be traced from the purchaser.

In considering sec. 4, the question may suggest itself viz., Difference bewhat difference does it make whether descent be traced tween tracing from person from the person last entitled, or from the person from whom last entitled, he inherited? This will be best understood by consider-son from ing the following cases in illustration of the question; and whom he init will be seen that there is sometimes a most material differ-herited. Assume Geoffrey (in the second table of descents) to Instances. have been the purchaser, and to have died intestate, leaving only Francis, his eldest son, and a daughter, Bridget, by one wife, and another son, No. 8, by another wife; thus No. 8 would be brother of the half blood to Francis and Bridget: suppose further that Francis, as heir at law to Geoffry, entered, and died intestate, without issue: the question is, to whom does the estate descend? Bridget claims, as sister of the whole blood, in preference to No. 8. brother of the half blood to Francis, and she insists that descent, under this section, has to be traced from Francis, as purchaser, on the presumption that as being last entitled. he was the purchaser. No. 8, on the other hand, displaces this presumption, by shewing that Francis inherited from . Geoffrey, and consequently that Geoffrey is to be taken to be the purchaser, and as such, descent is to be traced from him; in which case by force of the second common law

canon (that the male shall be admitted before the fema which is not interfered with by the statute), he. No. would be entitled to take as son of Geoffrey, in prefere to Bridget the daughter; and this would be so. descent were to be traced from Francis, the person h seised and entitled, as being the purchaser, and not fre Geoffrey: then of course Bridget would take as of the whole blood to him, in preference to the brother of the ha blood; and the 21st section (subsequently explained) i such latter case, expressly postpones the half blood.

Difference in

The above case will also serve to exemplify the differen tracing des-cent from per. effect introduced by the statute in abolishing the tracir son last seized descent from the person last seized, and introducing the and from person last entitled as the stock of descen tled not seised without regard to seisin (a). At common law as Franc was the person last seised, and so descent had to be trace from him, No. 8, his brother of the half blood, not on would have been postponed by force of the 6th canon, being a collateral relative not of the whole blood, but before explained, he never could have taken under any c cumstances, and the land would have escheated, as on fa ure of heirs, rather than that he should have taken: but the same case under the statute, he not only takes as he to Geoffrey, the purchaser, but in priority to the sisters the whole blood to Francis, the person last seised (b).

Further instance.

In further exemplification, as well of the distincti between tracing from the person last seised, and from t purchaser; as also of the distinction under sec. 4, betwee tracing from the person last entitled, and from the pers from whom he inherited, may be put a case of great has ship (c). Assume Geoffrey to be illepitimate, to acquire estate by purchase, and die, leaving Francis his eldest a and heir at law, who enters, and dies intestate, without issue: here the land must escheat for want of heirs:: descent has to be traced, not from Francis, the person le

<sup>(</sup>a) See also ante pp. 126, 127, 128. (b) See post s. 21 of the Con.

<sup>(</sup>c) Doe. Blackburn v. Blackburn, 1 Moo. and B. 547, per Parke, post 169 n. a.

seised and last entitled, but from Geoffrey (as Francis inharited from him), and as Geoffrey was illegitimate, there can be no heirs: and thus the mother of Francis (wife of Gooffrey) and all claiming through her, are excluded, as not being of the blood of the purchaser. In England the hardships in this latter instance is removed by the 22nd and 23rd Vic., ch. 35, ss. 19, 20,

Take this further case: suppose No. 11, and Geoffrey in the second table of descents, brothers of the whole blood: Geoffrey has two sons, John and No. 8, by different wives. therefore half brothers: John purchases an estate and dies intestate, seised, without issue. Now before the statute, No. 11, the uncle of John, would be his heir, and not No. 8. his half brother: since No. 11 would be next collateral beir of the whole blood to John, the person last seised. Let us now go a little further, and assume that No. 11 entered and died after the passing of the statute, intestate, leaving A his only son: here, if descent has to be traced from John. the purchaser, the heir will be, not A., the son of No. 11. but Geoffrey, if living, or if dead, No. 8, the half brother of John. If the descent has to be traced from the person Lest entitled simply, without regard to his having inherited. of course A., the son of No. 11, would take.

In the instance above, A. would take, but the strict When person literal construction of the Act, which would exclude A., is last entitled who inherited not without authority. Watk. Conv. 9 ed., 455, note by dies, leaving Coventry. 1 Hayes, Conv. 314. Byth. & Jarm. Conv. by s. 4 apply, to Sweet. Vol. 1, 139, 140. Mr. Joshua Williams at one time the detriment apported this view. It will be observed the son of the chilperson last entitled by a literal interpretation of the Act, would be excluded by a collateral relative of such person: proposition which leads to the consideration of Cooper v. France (a), and other cases involving the same question. which is substantially this: whether, where the person last entitled, who has inherited the estate, dies, leaving children

<sup>(</sup>a) 14 Jurist. 214-V. C. Shadwell; Muggleton v. Barnett, et al, 1 H. <sup>4</sup>N. 282, 2, H. & N. 653, s. c.

living, the statute is to be considered as applying so as compel the descent to be traced, not from the parent, I from some prior purchaser, to the detriment of the childr who would thus, as in the circumstances of the two callast above, not take the property as enjoyed by their pare. This question led to a controversy more widely spread a almost as famous in the profession as that which exist under the old law, wherein Lord Bacon, Sir Matthew Hall Blackstone, and other authorities, differed (a); and the authorities in cases wherein the question is involved had differed in England, Canada, (b) and Australia (c).

Cooper v. France.

In Cooper v. France, the case shortly in effect may stated thus: A. was purchaser and died intestate. leavin two daughters, who took as coparceners. One of the daughters died leaving a son, her heir at law. The questio was whether, as the mother inherited, descent was to ! traced from the purchaser A. quoad her share; in which case, by a literal construction of the Statute, such sha would again descend in copercenary, and be divided equal between the surviving sister and the son of the deceased so that the son would not get his mother's original shau one half, but only one half of one half, and the survivi sister his aunt the whole residue. It was decided howeve that in such case the son would take his mother's who share: such seems to be also the opinion of Lord St. Leo ards (d), and of the present learned President of the Cou of Error and Appeal. (e). Shadwell, V. C., thought in plain a case the Act did not apply. In the case in Austra of Badham v. Shiels, 7 Jurist, N. S., 509, one Mary Cann became indebted to the plaintiff in a specialty debt. S had inherited land from her father, the purchaser, and di intestate, leaving a son, her heir at law, who died, leavi the defendant his heir at law. The defendant was sued having assets by descent from Mary Cannon; and 1

Badham v. Shiels.

<sup>(</sup>a) See post sec. 20, Con. Stat.

<sup>(</sup>b) Wigle v. Merrick, 8 C. P. U. C., 307.

<sup>(</sup>c) Badham v. Shields, 7 Jur. N. S. 509.

<sup>(</sup>d) Sug. Stat. 280, 281. (e) Wigle v. Merrick, 8 C. P. U. C. 30-

deferace was that as Mary Cannon inherited from her father, the purchaser, and descent therefore had to be traced from him, the estate was not assets in his, the defendant's hands by descent from Mary Cannon, to satisfy her specialty debts. Two judges held that they were: another held that thev were not.

Section 7 is treated of next after s. 21.

## SECTION 8.

8. Proof of entry by the heir after the death of the ancestor Heir-at-law shall in no case be necessary in order to prove title in such heir, need not prove or in any person claiming by or through him. 4 W. 4, c. 1, L 10.

This section was in furtherance of the intention to abolish necessity of seisin to constitute a stock of descent; it is not in the Imperial Act, and appears to be superfluous (a), because as the descent is to be traced from the purchaser, it is indifferent whether the person last entitled was in actual seisin or not, for his seisin if it existed, would not affect the descent, which is not to be traced from him. Nor does this section abolish necessity for actual entry, or its equivalent, by an heiress, to qualify her husband to take as tenant by the curtesy (b).

## SECTIONS 5, 6 AND 9.

5. When any land shall have been devised by any testator, Heir entitled who shall die after the first day of July, one thousand eight hun- under a will shall take as dred and thirty-four, to the heir or to the person who shall be the devisee and a heir of such testator, such heir shall be considered to have acquired the grantor or the land as a devisee and not by descent; and when any land his heir shall shall have been limited by any assurance, executed after the said create an esfirst day of July, one thousand eight hundred and thirty-four, to chase the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have

<sup>(</sup>a) See the remarks of Draper, C. J., as to this section in Wigle v. Merrick, 8 C. P. U. C., 318, 319.

See remarks ante p. 120, note a, and the judgment of Hagarty, J., in Wigle v. Merrick, supra.

acquired the same as a purchaser, by virtue of such assurance ar shall not be considered to be entitled thereto, as of his forme estate or part thereof. 4 W. 4. c. 1. s. 2.

When heirs take by purchase under the heirs of their ancestor. the ancestor purchaser.

6. When any person shall have acquired any land by purchase under a limitation to the heirs, or to the heirs of the body of an limitations to of his ancestors, contained in an assurance executed after the mi first day of July, one thousand eight hundred and thirty-four, the land shall under a limitation to the heirs, or to the heirs of the body of an descend as if of his ancestors, or under any limitation having the same effec the ancestor had been the contained in a will of any testator who shall depart this life after the said first day of July, one thousand eight hundred and thirty four, then and in any of such cases, such land shall descend, an the descent thereof shall be traced as if the ancestor named : such limitation had been the purchaser of such land. 4 W. 4. 1. s. 3.

Limitations made before 1st July, 1884, not been made.

9. Where any assurance executed before the said first day July, one thousand eight hundred and thirty-four, or the will to the heirs of any person who died before that day, contains any limitation a person then gift to the heir or heirs of any person under which the person living, shall take effect as persons answering the description of heir shall be entitled to if this Act had estate by purchase, then the person or persons who would ha answered such description of heir if this Act had not been mac shall become entitled by virtue of such limitation or gift, wheth the person named as ancestor shall or shall not be living on after the said first day of July, one thousand eight hundred a thirty-four. 4 W. 4, c. 1, s. 12.

S. 5. Reasons for first branch of it.

Of course, when so important a change was made as 1 quiring descent to be traced from the purchaser, instead from the person last actually seised, it became requisite provide for many cases in which, by the common law re sons were considered as taking by descent, although t facts were such as shewed an apparent intent that th should not so take; as in the case for instance, of the heir law taking by devise from his ancestor. Here, if the dev were to take effect in the same way as the estate wo have descended to the devisee as heir at law, he was 1 considered as taking under the will, as a purchaser, would be the case with any devisee not being the heir

On devise to heir he took still by descent at common law,

law, but he was considered as taking by descent (a), so that if this rule had not been altered by the statute, on the death of such person intestate, descent would after the statute, have been traced not from him, but from his ancestor, if the purchaser. To remedy this particular case, under St. Wm. the first branch of the 5th section was passed, declaring as purchaser, that the heir at law should not be considered as taking by descent, but as devisee; in other words, as purchaser. It this varied by will be seen that under section 52, and other sections of Stat. Vic. the statute of Victoria, the effect of this section is much varied

The bearing and importance of this first clause of sec. 5, Effect of s. 5, may be illustrated by the following case, viz., that Geoffrev. c. 1. the purchaser, died, leaving as his eldest son and heir at law, Francis, and leaving also a daughter, Bridget, by one wife, and another son, No. 8, by a second wife, and consequently brother of the half-blood to Francis. Geoffrey to have devised the land to his heir at law, Francis, in fee: now but for sec. 5, the devise would have been wholly inoperative to alter the descent, since Francis, notwithstanding it, would have been in by descent, and not as purchaser: consequently, as before explained, as Francis inherited from Geoffrey, and Geoffrey was the purchaser, the person claiming as heir would have to make himself heir to Geoffrey; and this would be No. 8, the son of Geoffrey, and the brother of the half-blood to Francis, to the exclusion of Bridget, the sister of the whole blood: but, by virtue of sec. 5, this would not take place, for by it the devise would operate so as to make Francis take as purchaser, and the party claiming would have to make himself heir to him, and not as above to his father Geoffrey: now the heir to Francis would be Bridget, his sister of the whole blood, in preference to No. 8, his brother of the halfplood

As to the last clause of section 5, and sections 6 and 9, Latter part of these may be considered together, and the change effected and 9.

<sup>(</sup>a) Ante, pp. 128, 129.

by them will be best understood by considering the pr law on the subject (a), bearing in mind the distincti "Right heirs" between "heirs of the body," and "right heirs," whi and "heirs of latter term includes collateral relatives, as brother, und and their issue.

when and how ancestor could make them take by purby descent.

At common law, the heir wherever it was practicall by conveyance took by descent as his better title; and no man could b deed, without departing with the whole estate out of his chase, and not raise a fee simple to his own right heirs by that name s purchasers: nor could be by deed at common law, make the heirs of his body take by purchase: and though b way of use he could effect the latter object, yet he coul not make his heirs general take by purchase, or alter the descent by such a limitation by way of use. To effect the object, it was necessary to depart with the whole estat and take under a new conveyance back, an estate which would vest in him, or his heirs by purchase, according limitation. What is above stated may be exemplific partially by the following: assume A. to be seised: fee, and before the statute to convey by a common la conveyance, as feoffment, or lease and re-lease, to B. f. life with remainder to the heirs of the body of him A.: with various remainders, and an ultimate remainder to b Here the heirs of the body in the one cas and the right heirs in the other, would take by descer and not by purchase; the remainders would be consider as of the old estate. But if A. had by common law co vevance, conveyed to C. in fee to the use of B. f life, and on his death to the use of the heirs of the body him A. in remainder; here, as the limitation is by way use, A.'s heirs of the body would take by purchase, and n by descent. But A. could not so make his right heirs tal by purchase: as, if the conveyance had been to the use A. the grantor for life, and on his death without issue to t use of his right heirs in fee; the right heirs would neve theless take by descent. To have made the right heirs ta

<sup>(</sup>a) Sugden's Statutes, 259, 260, 2nd Ed.

by purchase, it would have been requisite for A to have conveyed to B. in fee, and then by a new and distinct conveyance to have taken back the estate with the requisite limitations. The law on this head, as it existed at common law, was before alluded to, and an instance given of the practical effect of the alteration by the statute (a).

The following remarks of Mr. Haves, in reference to the above sections, will be of service: he says: (b) " If A seised in fee, convey or devise either at the common law or by way of use to B and the heirs of his body, or to B and his heirs, B will take an estate in fee-tail or fee simple by purchase, and the word heirs will be merely a word of limitation indicative of the quantity or duration of his estate. If A, so seised, convey, at the common law, to B for a particular estate, as for life, or in tail, with reversion to himself (A) and his heirs, or, without naming himself as an object. (for the result will be the same), to his heirs or right heirs; or convey, by way of use, to himself (A) and his heirs or right heirs, or, without naming himself as an object, to his heirs or right heirs, either in possession or in reversion, or by way of springing use, A will take an estate in fee by purchase, and the word heirs will be merely word of limitation indicative of the quantity or duration of his estate; for though, in the instance of the limitation to his heirs or his right heirs, it is by the attraction of his former ownership, and not by force of the express terms of the instrument, that the fee revests in him, yet the statute (sec. 3), imbues that fee with the descendible Pulities of a new estate. In fact, A takes, under his own surance, as if the estate were to him and his heirs of the gift of a stranger: and where he creates a particular estate, limiting the expectant fee to himself and his heirs, or without naming himself as an object, to his heirs, he takes the fee, for the purposes of descent at least, not as a leversioner, but as a remainder-man. But where, on a con-Tyance at the common law, creating particular estates

<sup>(</sup>a) Ante pp. 128, 129.

<sup>(</sup>b) Hayes Conv. 5 ed., vol. 1 p. 317.

only, the fee tacitly remains in the grantor; and wh a conveyance to uses, not disposing of the ultimate of any use, the use of the fee tacitly results to the gr his former estate is preserved. If A, so seised, devise heir, or to the person who shall sustain that cha individually, the devisee will take, as such, by purch the same manner as if he were a stranger. Again, if seised, convey or devise, either at the common law way of use, to the heirs of the body, or to the he right heirs of B, (who, if the conveyance be at the mon law, must be a deceased person, since it otherwise be void, as being a conveyance in futuro) th will take, as a purchaser, an estate commencing in hi but the statute will direct the succession through th of heirs of the ancestor, in the same manner as if the had really commenced in such ancestor; and consequ a limitation to the heirs, as purchasers, of the maancestor will pursue the maternal line. It is I necessary to observe, that if the limitation to the he B. were preceded by the limitation to him of a part estate of freehold of the same quality, legal or equ the limitation to his heirs would then operate, by forc well-known rule of law as a limitation to himself an heirs: whereas in the case of a limitation to the he A, the grantor, it is wholly immaterial whether the any such prior limitation to him or not, since he, in r of his former ownership, will always take the benefit limitation to his heirs, though now by force of the s (sec. 3), he will take it as a purchaser."

Before concluding considerations of these section may be observed that there is an apparent anomal regards the hereditary quality of an estate affects sec. 6: thus, if lands be limited by a stranger to A for with remainder to the heirs of B, and B die durin particular estate, his heir will take as purchaser; but the purpose of tracing descent, the ancestor B is deemed the purchaser; and it makes no 'lifference the ancestor, who for the purpose of tracing descent from

is to be treated as the purchaser, takes no interest in the land (a).

#### 'SECTIONS 17 AND 18.

17. No brother or sister shall be considered to inherit immesiaters and distaly from his or her brother or sister, but every descent from trace descent a brother or sister shall be traced through the parent. 4 W. 4, through parents.

18. Every lineal ancestor shall be capable of being heir to any Lineal ancestor his issue, and in any case where there is no issue of the purtor maybe heir in preference to collateral to any person who would have been entitled to inherit, either persons claiming tracing his descent through such lineal ancestor, or in consequence of their being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a material lineal ancestor or his issue. 4 W. 4, c. 1, a. 5.

These sections may be considered together. It must be Establishing right of lineal borns in mind that at common law the inheritance never ancestor in bineally ascended, but only collaterally (b). Section 18 preference to collaters the common law rule of excluding the lineal ative.

ancestors; and by it the father of the purchaser will take before his children, the brothers and sisters of the purchaser; and the grandfather before his children, the uncles and sants of the purchaser, and so on in the ascending scale ad infinitum, contrary to the common law. Section 17 resulted from the enactment of sec. 18 (c). Under these sections alone the half blood of the purchaser cannot inherit by descent from the common ancestor, for it is only by sec. 21, that the common law rule is abrogated which required that the collateral kinsman to take as heir should be of the whole blood.

The Act of Vic. by ss. 27 and 28, recognizes the The act of Vic. right of the parents of an intestate to take in preference extends only to his brothers or sisters, but only in certain cases to a limited extent.

<sup>(</sup>a) Sugden's Statutes 260.

<sup>(</sup>c) See the former law p. 136.

<sup>(</sup>b) Ante p. 120.

The male line to be preferred.

19. None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants have failed; and no female paternal ancestor of such person, nor any of her descendants shall be capable of inheriting. until all his male paternal ancestors and their descendants have failed, and no female maternal ancestor of such person, nor any of her descendants shall be capable of inheriting, until all his male maternal ancestors and their descendants have failed. c. 1, s. 6.

The mother of the more remote male ancestor to be

20. Where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancespreferred to tor, or her descendants, shall be the heir or heirs of such person, the mother of theless remote in preference to the mother of a less remote male paternal ancesmale ancestor. tor. or her descendants; and when there shall be a failure of male paternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor and her descendants. 4 W. 4, c. 1, s. 7.

> It will be observed that these sections proceed on much the same principles as governed under like circumstances at common law, with the variation only of admitting the lineal ancestors to take before their issue. The Act of Victoria by ss. 27 and 28, also recognizes the right of lines. ancestors in the first degree, as parents of the intestate, to take, but in certain cases to a modified extent only.

8. 19. Male to female.

For the consideration of section 19, it is necessary that line of ancestors preferred there should be a proper appreciation of the words, pates nal ancestor, maternal ancestor, male paternal ancesto1 female paternal ancestor, male maternal ancestor, female maternal ancestor.

Definition of ternal, male paternal, female paternal, male maternal, female maternal, ancestors.

In one sense, paternal ancestor, and male paternal ancest paternal, ma-tor, mean one and the same class of persons; thus to examining the table of descents it will be seen that Geoff rey, George, Walter, and Richard Stiles, answer the descript tion of paternal as well as male paternal ancestor. when the term male paternal ancestor is used in connection rith, and in contra-distinction to female paternal ancestor. at it bears a different signification from paternal ancesr. Thus in speaking of the paternal ancestor George tiles, (No. 10) in connection with his wife, Cecilia Kempe, No. 24) he would be termed the male paternal ancestor. id she the female paternal ancestor: and so in reference Walter and Richard Stiles and Cecilia Kempe: or Richd or Walter Stiles and Christian Smith. (No. 19) and it to convey this distinction that the terms male paternal d female paternal ancestors are used in the statute. very mother of a lineal paternal ancestor of a puraser, is a female paternal ancestor. The converse of the ove holds in reference to female maternal ancestors and ale maternal ancestors; thus Lucy Baker, (No. 37) ther Thorpe, (No. 54) Emma White, (No. 62) and Catha-16 Ward. (No. 66) are maternal ancestors in direct line of eal ascent: but spoken of in connection with other anstors of the purchaser on the mother's side, they would termed female maternal ancestors. Thus Esther Thorpe, the grandmother of the purchaser, spoken of in connecn with Andrew, 40, Herbert, 43, or Henry Baker, 46. uld be termed the female maternal ancestors, and they male maternal ancestors. Every mother of a lineal ternal ancestor is a female maternal ancestor. le maternal and female maternal ancestors, trace and end through the mother of the purchaser; whilst the le paternal and female paternal trace and ascend through father of the purchaser.

The first clause of sec. 19 provides that maternal ancess shall be postponed to paternal ancestors and their dendants: thus before the mother of the purchaser, Lucy ker, or any one claiming through her can take, the semal ancestors in direct line of lineal ascent, and the scendants of each must fail.

The second clause provides that no female paternal antor, or her descendants, shall take until the male paterlancestors and their descendants shall have failed. The st clause only postponed the maternal ancestors, this post-

pones the female paternal. Thus the mother of the chaser's father is postponed, and those claiming thre her, (though perhaps of nearer consanguinity) to the paternal ancestors and their descendants: thus Rich Stiles, No. 16, and his descendants, will be preferred to mother of the father of the purchaser. Cecilia Ker No. 24.

The last clause of sec. 19 provides that no female mater ancestor, or her descendants, shall inherit till all the male ternal ancestors and their descendants have failed: thus mother of the mother of the purchaser, Esther Thorpe, 54, is postponed till the father of the mother of the purch Andrew Baker, No. 40, and his descendants, and his ternal ancestors and their descendants shall have far Under this 19th section, the same preference is given males among the purchaser's ancestors, as among his It will be observed that this and the follow section proceed on much the same principles as preva under like circumstances at common law, with the varia of allowing the lineal ancestors to take.

8. 20. Mother of more remote to take in preference to mother of less remote ancestor.

Section 20 provides for cases, which it will be seen not touched by the section 19, and were left in doub common law, viz., who shall take on failure of the r naternal ancestors and their descendants; and who male paternal failure of the male maternal ancestors and their descriptions ants, thus suppose the male paternal ancestors, Geoff George, Walter, and Richard Stiles, and their descende to have failed: who now would take? Would it be A Godfrey, No. 18, the mother of Walter Stiles, the n remote male paternal ancestor; or would it be Co Kempe. No. 24, the mother of the least remote male pa nal ancestor? Reference to section 19 will shew that does not apply to claims between female paternal ances as among themselves, nor to male maternal ancestors, am themselves.

> The question settled by the 20th section was a v celebrated one, and one on which the most learned wri differed as Lord Bacon, Sir Matthew Hale, Blackst

Watkins, and others. The 20th section now settles the point, and under it, Anne Godfrey would take priority over Cecilia Kempe, so also would Christian Smith, 19, for the same reason; and all claiming through Christian Smith. as her children, father, or mother, tracing their descent from her as entitled before Cecilia Kempe, would also be so entitled

In the second clause of the 20th section there is a mis- S. 20, latter take, and the same mistake occurs in the original statute part. Mother 4 Wm. IV. The wording is "failure of male paternal ances- mote male metors," whereas it should be "male maternal ancestors," is manifest it should be "maternal," because the intention ference to was, and the necessity was, to provide for a similar case mother of less among the male maternal ancestors as was just above provided for among the male paternal ancestors, which case among the male maternal ancestors as between themselves, was left untouched by the 19th section. on failure of the male maternal ancestors Andrew, 40, Herbert, 43, and Henry Baker, 46, and their descendants. who would take? Would it be Susan Bates, 48, the mother of the most remote, or Hannah Willis, 49. the mother of the less remote male maternal ancestor? This again, was the same question on which the learned writers above referred to have differed, and the manifest intention and necessity was to provide for this case. Sense and effect can however be given to this clause, by rejecting part as surplusage, and reading it thus, "and the mother of the more remote male maternal ancestor, &c."

It to take in pre-

# SECTION 21.

Any person related to the person from whom the descent is to Half-blood to be traced by the half blood, shall be capable of being his heir, and inherit after the place in which any such relation by the half blood shall stand blood of the in the order of inheritance, so as to be entitled to inherit, shall same degree. be next after any relation in the same degree of the whole blood and his issue, where the common ancestor shall be a male, and next after the common ancestor when such common ancestor shall be a female, so that the brother of the half blood on the

part of the father, shall inherit next after the sisters of the w blood on the part of the father and their issue, and the bu of the half blood on the part of the mother, shall inherit after the mother. 4 W. 4, c. 1, s. 8.

By the combined operation of sections 17 & 18 al the half blood of the purchaser would not have been ad ted, as by this section only is the common law rule cinded which required the collateral kinsman to tak heir should be of the whole blood.

Half-blood never took at com, law from each other.

We now come to relationship and descent of the blood. As before mentioned (a), the half-blood c never succeed by descent to each other. The land w escheat rather, if there were no other heirs. Geoffrey purchased and died intestate, seised in fee, lea only John his eldest son and heir at law by his first and No. 8, his second son by another wife; and John ent and died seised, without issue. No. 8 could never in at common law to his half brother, nor could John to But if John had not died seised; then, as de at common law was traced from the person last act seised, who was Geoffrey, No. 8 might have inherited as heir to John, but as son and heir to Geoffrey.

Instances of application and non-applias to halfblood.

Such a case as this is remedied by the operation of 4th section alone, without reference to the 21st, which cation of s. 21 fact does not apply to such a case. That section applies to the case of a person related by the half bloc the person from whom descent is to be traced: but, is above case, No. 8, in tracing his descent, is not relate the half blood but by the whole blood to Geoffrey father (the purchaser), from whom descent is to be to on its being shewn that John inherited; and conseque s. 21 does not, and s. 4 alone does apply; and the l gives No. 8 the estate, and that in preference even to sisters of the whole blood of John, the person last ent so that the half blood actually excludes the whole ! of the person last entitled. What s. 21 provides for i

such a case as above, but such as follows: assume, in the above case. John to have been the purchaser, instead of having inherited from Geoffrey as the purchaser, and to have died seised without issue, leaving only his father Geoffrey. his sister Bridget, and his half brother No. 8 him surviving. Now in this case also at common law, No. 8 could never inherit: but under the statute, on John's death, the estate would go to the father Geoffrey, and on his death, since he inherited, descent would be traced, not from him, (in which case it would go to No. 8.) but from John; and therefore. Bridget, his sister of the whole blood, would take in preference to No. 8, the brother of the half-blood. Bridget's death after entry, without issue, an heir would be wanted; and at common law this heir would not be No. 8, who could not inherit (being of the half blood). but would be Bridget's uncle, the brother of Geoffrey, or other collateral ancestors: but under s. 4, on Bridget's death, descent would have to be traced again from John. the purchaser, and No. 8 would be within the exact words of section 21, viz. a "person related to the person from whom the descent is to be traced, by the half-blood," and therefore he would be capable of inheriting, and he would be, in the words of that section, "a brother of the half-blood on the part of the father" inheriting "next after the sister of the whole blood on the part of the father."

Thus again, in the table of descent, Nos. 8, 9, and 9, the issue of Geoffrey Stiles, and of the half-blood to John the purchaser, would at common law never inherit, at least by tracing descent from him; but under section 21 they take next after the sisters of the whole blood on the part of the father, Bridget and Alice Stiles.

Where the common ancestor is a female, as where the where halfhalf-blood is related through a mother on a second mar-blood are related not rage, instead of through a father; here the half-blood take through the immediately after the mother, the common ancestor, since father but the mother. such mother does not take herself till all the paternal ancestors and their descendants are exhausted.

Under certain circumstances the half-blood to the per-

son last entitled are not admitted to inherit: thus if John were last entitled and shewn to have inherited from his father Geoffrey, the purchaser, his half blood on his mother's side. Nos. 38 and 39, never take; in fact the maternal ancestors of John and their descendants are all excluded, as having in them none of the blood of Geoffrey the purchaser. And so also, if John were shewn to have inherited from his mother the purchaser, the whole paternal side including the half-blood on that side are excluded S. 21 admits only the half-blood of the person from whom descent is to be traced, and in neither of the above cases have the half blood to John any of the blood of such person; in both cases the estate will escheat rather than such halfblood or ancestors be admitted to inherit.

The hardship of the above case, as also of a case before referred to (a), would not have arisen if the Act had followed the report of the real property commissioners, who recommended that descent should be traced from the person last entitled, and not from the purchaser; and Lord St. Leonards has expressed his approval of this plan (b).

The Statute of Victoria has dealt in many respects more liberally with the half-blood than this Act.

## SECTION 7.

After the son attainted his descendants may inherit.

7. When the person from whom the descent of any land is to death of a per- be traced shall have had any relation who, having been attainted, died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing is descent through such relation if he had not been attainted, unless such land escheated in consequence of such attainder before the first day of July, one thousand eight hundred and thirty-four. W. 4, c. 1, s. 9.

This section is taken from the Imperial Act 3 & 4 Wm. Imp. St. 3 & 4 Wm. 4, c. 106, 4, c. 106, s. 10, and in connection with it should be considы. 1Q. ered the provisions of the Prov. Act 3 Wm. 4, ch. 4, Con. Stat. U. C., ch. 116, taken from the Imp. Act 54 Geo. 3, ch. 145.

<sup>(</sup>a) Ante. p. 146.

<sup>(</sup>b) Sug. Stat. 263.

#### CON. STAT. CHAP. 116.

#### AN ACT RESPECTING CORRUPTION OF BLOOD

- 1. Except in cases of high treason, and of abetting, procuring Except for or counselling the same, an attainder for felony, shall not extend high treason, no attainder to the disinheriting of any heir, nor to the prejudice of the right to disinherit or title of any person, other than the right or title of the offender the heir-atduring his natural life only.
- 2. Every person to whom, after the death of any such offender, After death of the right or interest to or in any lands, tenements or heredita- the person atments should or would have appertained if no such attainder had tainted the taken place, may enter into the same. 3 W. 4, c. 4.

These sections are taken from the Imp. Stat. 54 Geo. 3. Imp. St. 54 Geo. 3, c 145. ch 145

There was a distinction between forfeiture to the Crown and escheat to the lord (a), but the distinction is of little importance here; there being no mesne lords, and all fee simple lands being held of the Crown, the Crown would take whether on forfeiture or by escheat.

The law of escheat on attainder for treason or felony is Escheat and thus described by Sir W. Blackstone: "The blood of the corruption of thus described by Sir W. Blackstone: "The blood of the blood on attenant being utterly corrupted and extinguished, it follows tainder. not only that all that he now has shall escheat from him, but he shall be incapable of inheriting anything for the There is yet a further consequence of the corruption and extinction of hereditary blood, which is this: that the person attainted shall not only be incapable himself of inheriting or transmitting his own property by heirship, but shall also obstruct the descent to his posterity, in all cases where they are obliged to derive their title through him from any remoter ancestor." Therefore in the case of grandfather, father, and son, and the father atwinted, and dying in the lifetime of the grandfather who dies seised in fee, the son at common law could not inherit, but under sec. 7 he can. As the descent between brothers \*\* at common law immediate, and the father need not

<sup>(</sup>a) 2 Black. Com. p. 251.

have been named in the pedigree, his attainder would not prevent one brother from inheriting to the other (a).

The case of fee tail differed from a fee simple at common law, as the issue in tail claimed per formam doni: therefore, if the son of donee in tail were attainted and died in the lifetime of his father, leaving issue, the latter would take notwithstanding the attainder. (b).

Con. Stat. ch. 82 does not prevent escheat as to

In such case 116 applies. 7 Anne, c. 21, es of treason.

The Act of 4 Wm. 4. alone would not apply to prevent an escheat where the estate was vested in the party attainted, as it applies only to tracing descent through him. vested estates The Act of 3 Wm. 4, however, prevents escheat or forfeiture in such case beyond the life of the offender, but the Con. St. c. still it does not apply in cases of treason. The Stat. of except in cas- 7 Anne, ch. 21, sec. 10, is in terms the same as the Act of 4. es of treason. Wm. 4.. except that it only applies in cases of treason. Its applies in cas- operation was postponed by the Stat. 17. Geo. 2. ch. 39. till after the death of the Pretender and his sons, and both these Acts were repealed in England by the Imp. Act. 39 Geo. 3, ch. 93. As this repealing Act was passed in England subsequently to the grant of a Constitution to Canada, and the introduction of the English law as it then stood by Prov. Act 32 Geo. 3, ch. 1, it is not in force, and has no repealing effect here (c); unless, indeed, it is to be deemed of such general import to all British subjects, as by its mere enactment to apply to all British Colonies (d). the Imp. Act does not apply, then, as Cardinal York, the last son of the Pretender, died in 1807, it would seem that in Canada in cases of treason, corruption of blood and forfeiture, except for life of the offender, is abolished.

#### SECTION 10.

Grantees, de-

10. Whenever by any letters patent, assurance or will, made visces, &c., and executed after the first day of July, one thousand eight

<sup>(</sup>b) Dowtie's case, 3 Rep. p. 25. (a) 1 Vent. 413.

<sup>(</sup>c) Dunn v. O'Reilly, 11 C. P. U. C., 404; Blackstone Com. Leith, p. 17.

<sup>(</sup>d) Brook v. Brook, 9, H. L. Ca., 1861, pp. 214, 222, 240; Black stone Com. by Leith, p. 21. See also the words "necessary interest in the Imp. Act 3 & 4 Vic., ch. 35, sec. 3, Con. Stat. Ca., p. 20-

I and thirty-four, land shall be granted, conveyed or as joint-tento two or more persons other than executors or trustees, ants unless simple, or for any less estate, it shall be considered that be expressed rooms took or take as tenants in common, and not as joint unless an intention sufficiently appears on the face of ters patent, assurance or will, that they shall take as joint 4 W. 4, c. 1, s. 48.

sutors and trustees are excepted from the operation Executors and section, since they are appointed, and estates are trustees excepted. in them by reason of personal confidence reposed in and it is more consistent with intention and conce that the survivor should hold solely than in n with the representatives or devisee of the deceased

er the former law, on a simple conveyance or devise by the old law on more, they took, as a general rule, as joint tenants an intention sufficiently appeared on the face of the took as joint tenants unless tenants that they should take as tenants in common. It is a contrary infollowed the law, except in the case of loan on tention appeared. So also in a sapparent on the face of the instrument, or with equity, except in certain cases.

The former rule is reversed, and the burden of proof ntention thrown on those who insist on a joint y.

tions can rarely arise under this section, for it happens (unless in the excepted cases of trustees ecutors) that there is any intention of jus accrescendi, at the parties should take otherwise than as tenants mon on a conveyance on devise to two or more, and intention exist, it is generally (on a conveyance rivos at least), so expressed as to remove all doubts. t be borne in mind however that though benefit of Benefit of surprising points strongly to a joint tenancy, it is not vivorship, or the words "as

<sup>30</sup> ante, p. 84.

notes to Morley v. Bird, Tud. Lg. Ca. 2nd Ed. 788.

tablish joint tenancy.

"as joint ten- conclusive even under the old law. "A tenancy in ants" not con-clusive to es- mon, with benefit of survivorship is a case which exist, without being a joint tenancy, because survivo is not the only characteristic of a joint tenancy" (a) it has been held that even the use of the words "as tenants" in a bequest of personalty is not conclusi favor of a joint tenancy (b).

Cases in wills words importing a tenancy in common.

Subsequent expressions following words, which sta wherein joint by themselves will confer a tenancy in common, may red, as against it was a testator's intention to confer an estate in tenancy, as by a gift over being only to take effect the decease of the survivor of several; or after the de or deceases of prior legatees: but where, before the over, there are previous gifts for life of distinct prop it will not be implied that survivorship was intended

This closes the enquiry as to the modifications c common law rules of descent effected by the Statu William, of which a comprehensive view can be ha examination or the table of descents. If it be desir consider more fully the objects of the statute, an grounds for the changes effected by it, reference show had to the report of the real property commissi on which chiefly the Imperial Legislature proceed passing the Imperial Act from which ours is taken.

## THE PRESENT LAW OF DESCENT.

Conforms to civil law and Stat. of Distributions.

The Statute of Victoria, which governs descent sin first day of January, 1852, is entirely subversive of former system, and based on the rules of the civil lav many respects, as hereafter pointed out, it bears a

<sup>(</sup>a) Doe d. Borwell v. Abey, 1 M. & S. 428, per Bailey, J.; 2 Wills, 3rd Ed. 700. See also Hatton v. Finch, 4 Bea. 186; Re Dri Estate, 19 Bea. 395; Haddelsey v. Adams, 22 Bea. 275; Cor Taaffe, 12 Ir. Ch. Rep. 338. See notes to Morley v. Bird, Tud. 2nd Ed. 798.

<sup>(</sup>b) Booth v. Alington, 3 Jur. N. S. 835, 27 L. J. N. S. pt. 1,

<sup>(</sup>c) See notes to Morley v. Bird, supra. See also 2 Jar. Wills, 240 et sea.

resemblance to the mode of succession to personalty under the Statute of Distributions, and many of the decisions on that statute, especially as to the advancement and hotchpot clauses, may be applicable to this statute; but in applying the cases the difference of language in the two acts hereafter pointed out must be borne in mind. This act Taken from seems to be copied almost entirely from the revised act of New the State of New York, and the American decisions under that act, and of the laws of descent of some other of the States of the Union will be found to be of service. (a).

# SECTION 22.

22. The following sections numbered from twenty-three to Descents since. rty-nine, both included, shall apply retrospectively to the first the 1st Januby of January, one thousand eight hundred and fifty-two incluive, and also prospectively, as the case may be, and shall be pastrued as if the same had been passed on the said first day of anuary, one thousand eight hundred and fifty-two. 14, 15 Vic., 6, s. 1.

The statute came into force on 1st Jan., 1852, which fact plains this section.

#### SECTION 23.

23. Whenever on or after the first day of January, in the How real es-Ear of our Lord one thousand eight hundred and fifty-two, any tate of an in-Erson shall die, seised in the fee simple or for the life of another after let Janany real estate in Upper Canada, without having lawfully unry, 1852, evised the same, such real estate shall descend or pass by way of accession in manner following, that is to say :-

Firstly—To his lineal descendants, and those claiming by or under them, per stirpes;

<sup>(</sup>a) The author regrets that he has had but limited means of availing himself of the sources of information referred to in the text; the American Reports at Osgoode Hall are far from being complete, or of recent date, and the only American text writers on the law of descent are Mr. Chancellor Kent and Mr. Washburn, both of whom treat of the abject in a very cursory way in their Commentaries on the Law of Real Property. The present Act of New York is, as far as the author can accertain, in the first Vol. of the Revised Acts of New York, p. 751, and to be found at Osgoode Hall in the edition of Denio and Tracey, Vol. 2, 157. A short sketch of the various laws of descent in the different States is given by Mr. Washburn.

Secondly-To his father: Thirdly-To his mother: and Fourthly—To his collateral relatives: Subject in all cases to the rules and regulations hereinafter wescribed. 14, 15 Vic. c. 6, s. 1.

It is to be observed that this section expressly includes Stat includes estates in fee estates pur autre vie, and does not include estates-tail: the simple, pur autre vie, but descent of the latter are governed therefore, as presently not estates explained, per formam doni. Moreover if the legal estate tail or estates held in trust. is vested in a trustee, then by sec. 41 this act does not apply to affect the descent of the legal estate, though by sec. 50 the equitable interest of the cestui qui trust will descend according to its provisions: the reference to the "fortieth" section in sec. 50, is a misprint for "forty-first" Sections 50, 51 & 52, should be referred to before considering other sections.

No longer trace from pur be traced from the purchaser, or person last entitled; but chaser. Do the language of sec. 23 is, that the real estate of any we revert to tually seised?

com lawrule of tracing from person who shall die intestate, seised in fee-simple, or for person last ac- the life of another, shall descend, &c. The first question which suggests itself on the language of this section is, whether we are again referred to the rigorous common law rule, which was, that the descent should be traced from the person last actually seised, and that a mere seisin in law did not suffice to constitute a good root of descent, a seisin in deed, or its equivalent, being requisite. Thus in a case put before, of A, a bastard dying seised, leaving his wife and wife's brother, and B his son and heir at law, him seised or person last enti-surviving; assume that B never was seised, and died intestled will the tate: here, at common law, as descent had to be traced to take as heir from A as last seised, the wife's relations could never take, and the estate would escheat; but had B entered, then his mother's collateral relative might have taken as heir to her Under the Statute of William, in such case there must always have been an escheat, even though B had entered, on its being shown that he inherited and that A

Descent is no longer as under the Statute of William to

According as descentis traced from person last person who is be variedinstances.

purchaser (a). The hardship in this instance removed here, but a remedy was applied in Eng-2 & 23 Vic. ch. 35, sec. 19.

h a case, under the Statute of Victoria, the would be whether the mother could take under part of sec. 28 as heir to B; or whether, as B uired seisin, descent would have to be traced from tirps, and so escheat; for it is apprehended that in se the mother could not take under sec. 37, which d to the next of kin to A under the statute utions.

suppose A, the purchaser, seised in fee, to grant a and die seised of the reversion in fee, leaving his father C, and wife D him surviving: here the would descend to the son B; but if he, B, died he life estate, (in which case, as before explained ould not at common law, for the purposes of ave acquired actual seisin.) the question would the Statute of Victoria, whether when the estate on became one in possession on the death of the t, the parties claiming must take A or B as the descent. If A be taken, then the estate will go ther, under the first part of sec. 27; if B be will go to the mother of B under sec. 28, and not ndfather.

ideration of the above, and other cases put before, New York St. the importance of the question. Sec. 23, as regards much as this., appears to be worded much as the statute of the New York of 1786. Mr. Chancellor Kent, in to that statute, says (c), "The rule of the compecision on. existed in New York under the statute of of 1786, and the heir was to deduce his title from a dying seised. It had been repeatedly held, that he existence of a life estate, the heir on whom sion or remainder was cast, subject to the life

Blackburn v. Blackburn. 1 Moo. and R., 547, per. Parke, B., (b) Ante p. 127. (c) Vol. 4, ed. 11, p. 388.

estate, was not so seised as to constitute him the posse fratris or the stirps of descent if he die pending the estate, and the person claiming as heir, must claim from a vious ancestor last actually seised. If the estate in fee been acquired by descent, it was necessary that there sh have been an entry to gain a seisin in deed to enable owner to transmit it to his heir: and therefore, if the he whom the inheritance had been cast by descent died be entry, his ancestor, and not himself became the person seised, and from whom the title as heir was to be dedu but the New York revised statutes have wisely altered pre-existing law on this subject."

The wording of the New York revised statute is: " real estate of every person who shall die without devi the same shall descend," &c. And by the interpreta clause the term "real estate" includes every estate, inte or right: our statute has adopted this interpretation cl (sec. 50), by which the term "real estate" is to inc every estate, interest, and right, legal and equitable. otherwise than in trust in fee simple, or for the life of ano We have however, still retained the word seised in sec which is struck out in the revised Statute of New Yor

The word with entitled to descent.

There can be little doubt that by virtue of the con seised identical hensive meaning given to the words "real estate," a for purposes of seisin is not requisite, and that the word seised in section will be construed as entitled to (a); for the word se in its strict sense, is inappropriate to many rights, inte and estates, which are to descend, and would therefor ceive a wider signification appropriate to such rights: n over by section 8 proof of entry by the heir is dispe with: still there are no decisions in our courts: our sta differs as explained above from the American; and the sometimes taken as law in the courts of the various S which would not be so taken here. Mr. Washburn after stating the rule at common law as to descent o

<sup>(</sup>a) Washburn Rl. Prop., Vol. 2, 2nd ed. pp. 405, 410.

<sup>(</sup>b) Washburn Rl. Prop., Vol. 2, 2nd ed., p. 405.

te in remainder or reversion dependent on a freehold te to be as before expressed (a), says in reference to an estate. " the law is changed in several, if not all United States, and the heirs of a reversioner or ainder-man take as absolutely as if their ancestors were ally seised of a freehold in possession. the word seised g equivalent to owning when applied to such an rest; a remainder-man or reversioner, therefore, becomes oper stock of descent. &c...:" and he refers to cases in ort of this decided under the Statute of 1786 above-If seisin in law, or mere right of ownership, ces under the Statute of Victoria to constitute a good s of descent, as would seem to be the case, then it is lar in its effect to the Statute of William, by which ent is to be traced from the person last entitled; the difference being that under the Statute of Victoria cannot shift the trace of descent from the person last tled by shewing that he inherited, as you can under the ute of William.

he wording of the 23rd section requires explanation, as Descent per somewhat calculated to mislead. It enacts that the capita, not per stirpes prete shall descend to the lineal descendants of the person vails, followseized, and those claiming under them, per stirpes: law. this expression at the outset would lead to the rence that the common law rule of succession per ses was to be the prevailing feature in the statute, reas it is just the reverse; and it is the civil law rule uccession per capita that prevails, and descent per pes only takes place as an exceptional case, as will be in the sequel.

ing the civil

## SECTIONS 24, 25 & 26.

4. If the intestate shall leave several descendants in the direct As to descendof lineal descent, and all of equal degree of consanguinity to ants in equal h intestate, the inheritance shall descend to such persons in consenguinal parts, however remote from the intestate the common ity. ree of consanguinity may be. 14, 15 V. c. 6, s. 2.

<sup>(</sup>a) Ante p. 127.

If some chiland others dead leaving isana.

25. If any one or more of the children of such intestate b dren be living living, and any one or more be dead, the inheritance shall descen to the children who are living, and to the descendants of suc children as have died, so that each child who shall be living sha inherit such share as would have descended to him if all the children of the intestate who have died leaving issue, had bee living; and so that the descendants of each child who shall I dead shall inherit in equal shares the share which their pares would have received if living. 14, 15 V. c. 6, s. 3.

Same rule as to other dercendants in unequal degrees of consanguinity.

26. The rule of descent prescribed in the last preceding section shall apply in every case where the descendants of the intestat entitled to share in the inheritance, shall be of unequal degrees consanguinity to the intestate, so that those who are in the near degree of consauguinity shall take the shares which would ha descended to them, had all the descendants in the same degree consanguinity who have died leaving issue, been living, and so th the issue of the descendants who have died, shall respectively to the shares which their parents if living would have received. ] 15 V. c. 6, s. 4.

S. 24 expressly introduces deof consanguinity equal,

Section 24 expressly introduces descent per capita scent per expita the exclusion of the former system of descent per stirpe when degrees Thus A dies seised, having had two daughters, both dear in A's lifetime; one of which daughters left one son, and th other eleven sons: here instead of the one grandson takin one half, as would be the case tracing descent per stirpe (by force of the 4th canon), he will only take equally wit the others, viz., one-twelfth. But it will be observed the rule only applies when all taking are of equal degrees consanguinity: otherwise under section 25, if in the above case, the mother of the one son had been alive on the deat others in une- of A, and the mother of the eleven sons dead; here as the de cendants of A are in unequal degrees of consanguinity, the mother living will take one half, and the eleven sons of the party per attrpee, partly per mother dead the other half between them all: the descen is partially per stirpes and partially per capita; it is p stirpes as between the daughter living and the eleven so of the daughter dead, but it is per capita as between se eleven sons among themselves.

but if some heirs be in equal and qual degrees, then under s. 25 descent partly perstircepite.

This mixed system of descent per stirpes or per capita according as the parties entitled are in equal or unequal degrees of consanguinity to the intestate is not confined to this section, and will be found to pervade the act. Inharitance per stirpes is admitted when representation becomes necessary to prevent the exclusion of persons in a remoter degree, as for instance when there is left a son, and children of a deceased son, but when all are in equal degree, as grandchildren, representation becomes unnecessary, and would occasion an unequal distribution, and all take per capita (a).

Take the following case in further illustration of this Illustration of · 25th section; assume that A has three children, B, C, and s. 25. D; that C and D die in the lifetime of A. C leaving two children and D four children, and then A dies seised. intestate: here B, the surviving child, will take one-third. being "such share as would have descended to him (by section 24) if all the children of the intestate who have died leaving issue, had been living; "the two grandchildren, issue of C, will take per stirpes quoad their ancestor, viz., onethird, which they will divide per capita between themselves, and each take half a third or sixth: and the four grandchildren, issue of D, will take in the same way, per stirpes, their ancestors share one-third, which they will divide between them per capita, and each take a fourth of 4 third. or a twelfth; and this because "the descendants of each child (of the intestate) who shall be dead, shall inherit in equal shares the share which their parent would have received if living." The 25th section applies only "if any one or more of the children of the intestate be living," and not where none are living, but have left descendants in unequal degrees: the latter case is reached by the 26th section, and by it the rule prescribed by section 25 "shall PPly in every case where the descendants entitled to e shall be of unequal degrees, &c.;" thus if in the case

As to descent per stirpes and per capita, and the grounds on the they severally rest, see Vinnius on the Institutes, lib. 3, tit. 1,

last put, B, C, and D, had been grand-children, instead children of A. (their parents being dead); section 25 w not have applied to meet the case, as no children of intestate would have been living on the death of the itate; but by the combined action of sections 25 and 26 estate would go as above stated. It will be seen here that a posthumous child is to be considered as in that, except in certain cases, the half-blood take equith the whole blood in the same degree: and that a who has been advanced shall bring, before participating advancement into hotch-pot.

The half blood and hotch pot.

Analogy in the above to right under St. of Distributions. The course of descent, as above mentioned, is the as the rule of succession to personal property prescribe the Statute of Distributions of Charles, under like cir stances, i. e., where an intestate dies leaving lineal cendants and no widow; and even if there be a wi the Statute of Victoria, section 41, expressly reserves widow's right to dower, which would be one-third for whilst the Statute of Distributions gives her one-labsolutely.

#### SECTION 52.

Interpretation as to sections 23 to 50.

52. Whenever in any of the said twenty-eight sections the pressions "where the estate shall have come to the intestate the part 'of the father,' or 'mother,' as the case may be used, the same shall be construed to include every case wher inheritance shall have come to the intestate by devise, g descent from the parent referred to, or from any relative blood of such parent. 14, 15 Vic. c. 6, s. 27.

This section is taken out of its order, inasmuch as the 27th, 32nd, 34th, 35th & 36th sections cannot be under without appreciation of it. The prior sections speat the estate "coming to the intestate on the part of father," or "mother," as the case may be, and send the scent towards the paternal or maternal line according preserving a relict of the preference given by the law to the blood of the purchaser: section 52 defines where the section of "the expression in the prior sections of "the expression in the prior section the the prior sect

coming to the intestate on the part of his father," or mother. as including "devise, gift, or descent from the parents referred to, or from any relative of the blood of such parents." It will be observed this section considerably alters and enlarges Alters and extends former the mode by which under the Statute of William, a person mode and was considered as taking an estate ex parte materna, or sense of takpaterna. as the case might be: he was before considered as chase. so taking, in those cases only where he took by descent, tracing from the paternal or maternal ancestor as the purchaser: but if (at least after the Statute of William) he took by gift or devise from such ancestor, then the estate was not considered as descending to him at all, but he took 28 purchaser (a), and parties claiming on his death had to make themselves heirs to him as the purchaser, and to no one else, and if they could not, the estate would escheat. The change effected in the Statute by Victoria is very great, as will be seen by considering one simple and common case: suppose that in the second table of descents, the estate had Instance of been either devised, or given to John Stiles, by his mother, change as to or any relative of hers; here under the statute of William, chase effected John Stiles would have been considered not as taking ex by Stat. Vic. parle materna at all, but as a purchaser; and the result was that all the paternal ancestors and their descendants, however remote, must have failed before any maternal ancestor, or any one claiming through such could have taken. however in such a case, the estate is to be considered as having descended ex parte materna, and the paternal line are excluded: except only that if the mother be dead, and there be any brothers or sisters of the intestate, or any of their descendants, the father will take a life estate; or if the mother be dead, and there be no brothers or sisters of the intestate. or their descendants, then the estate will go to the father: and paternal are postponed to maternal uncles and aunts.

Questions may arise as to the construction of sec. 52 in those cases where the intestate has taken from some Person on the paternal or maternal side, who in turn has

tive, who has

Case of the in- taken from the other side, and the question would be testate having which side would have preference in distribution of the inpaternal rela- heritance. Thus, the intestate has acquired the estate by tive, who has taken from a devise, gift or descent, from his mother, who acquired it in maternal rela- either of those modes from her husband, the father of the intestate: the only relatives are brothers and sisters of the mother, and brothers and sisters of the father, and under ss. 32 and 34, either side will take to the exclusion of the other, according to whether the inheritance is to be considered as come to the intestate on the part of his father, or of his mother. Again, if in the case above supposed there were brothers of the half-blood of the intestate on his father's side, would the half-blood be excluded under sec. 36: in which section however the words "ancestors" is made use of. Many other instances might be put under the various sections, (a) but the above will serve to elucidate the question. It is apprehended on the language and construction of the act and the American decisions (b) that in such cases the person from whom the intestate immediately takes is the propositus who alone will be regarded, and that you cannot change this by showing how the estate was acquired, as you can in cases of inheritance under section 4 of the Statute of William Thus where an intestate had inherited from his brother, who had inherited from his father, and the intestate left no descendants, ancestors, or brothers or sisters, it was held on the New York act and the sections therein corresponding to ss. 52, 35 and 32, that relatives on the side of the mother of the intestate were not excluded in favour of those on the side of the father (c).

> A further question is whether where the intestate has acquired an ancestral estate by gift devise or descent coming under section 52, alienation by him, which under the old by would have made him a new stock of descent, and also purchaser, and deprived the estate of its former hereditary

<sup>(</sup>a). See remarks under s. 36.

<sup>(</sup>b). Curren v. Taylor. 19 Ohio 36; Gardner v. Collins 2 Peters 58, Supreme Court; Hyatt v. Pugaley. 33 Barb. 373: Prickett v. Parkers 3 Ohio St. 394.

on the paternal or maternal side (a) will equally under this act to cause all consideration of the eing ancestral to be rejected (b). This question various shapes: thus if the intestate ise in the estate, there can be no doubt that the proceeds. exarmarked, would go as personal estate under the of Distributions. If the proceeds were laid out in al estate, this would have no ancestral quality in inder no circumstances would there be a preference tral paternal or maternal side. It would seem to especially on applying the former law (c), that the ould be the same if the intestate had conveyed to e, and forthwith, or at any time afterwards, obtained vevance: and consequently that there would be the sult if the estate revested through the medium of ute of Uses, as on conveyance by the intestate to a to uses to his own use. If, however, the intestate ot have made disposition of his entire interest, but of a portion, leaving a reversion to come by act of imself and his heirs, it is apprehended this reversion e imbued with the former qualities of the estate. meaning of blood relationship and of the words blood of," is considered in treating of sec. 36.

#### SECTION 27.

I case the intestate dies without lawful descendants, and If the intestate father, then the inheritance shall go to such father,- leave no e inheritance came to the intestate on the part of his rights of faand such mother be living; and if such mother be dead, ther, mother, ritance descending on her part shall go to the father for the reversion to the brothers and sisters of the intestate r descendants, according to the law of inheritance by colelatives hereinafter provided; and if there be no such or sisters, or their descendants, living, such inheritance cend to the father. 14, 15 Vic., c. 6, s. 5.

tte pp. 127, 152, 153.

<sup>1</sup> this head see the American cases, Champlin v. Baldwin, **i61**. (c) See last note.

8, 27, if no descendants. the father takes, unless inheritance came on the part of the mother, &c.

Meaning of expression "if the inheriintestate on the part of his mother and the mother be living."

The first clause provides that if the intestate die without descendants, the inheritance shall go to the father if living, unless the inheritance came to intestate on the part of the mother, and the mother be living: what shall be the descent in the latter event, if the mother be living. is provided for not by this section, but by sec. 28.

First however should be explained what is meant by the expression in this section as to the inheritance coming to tance come to the intestate on the part of his mother, and the mother being living. Taking the word inheritance in the sense in which in reference to descents it is frequently used (as in the 7th common law canon), as referring to or as synonymous with, course of descent, or the descent itself, instead of the subject matter thereof, it is difficult to understand how an inheritance as such can come to a child Mr. Justice Blackstone and others as from a living mother. express the 7th common law canon thus: "In collateral inheritances, the male stocks shall be preferred to the female, unless the lands have descended from a female:" in sec. 27, the word inheritance is not used in the sense in which it is used in the 7th canon, but in the sense in which the word lands is there made use of: for the 50th section declares that the word inheritance shall be understood to mean in the prior twenty-seven sections, " real estate;" and the 52nd section declares, that the words " where the estate shall have come to the intestate on the part of the father or mother," shall be "construed to include every case in which the inheritance shall have come to the intestate by devise, gift, or descent, from the parent referred to, or any relation of the blood of the parent" (a).

Instance of operation of 8, 27.

This section may perhaps be best explained by illustrating it by the table of descents. Thus assume John Stiles to be actually a purchaser for money: (for money is said, because the 52nd section, as above explained, has altered the meaning and implication of the word purchaser,

<sup>(</sup>a) See as to blood relationship under American acts, and that a father is within the meaning of the act of the blood of a child, Cole v. Batley, 2 Curtis, C. C. 562. See also remarks under sec. 36 and sec. 52.

as formerly understood, by excluding from it the case of a man taking by gift or devise from some relative on the father's or mother's side;) in such case, on John's death without issue, the father if living, would take under the first clause. The case of the inheritance coming ex parte materna, and the mother being living, is provided for in the 28th section, and that therefore is passed for the present. and the next clause proceeded to viz. the like case of inheritance ex parte materna, and the mother being dead, and the father Geoffrey, living, and also the brothers and sisters of intestate of the whole blood, Francis, Oliver, Bridget and Alice: here the father would take a life estate. and the reversion would go equally among the brothers and sisters. If also at the time of death of John, his halfbrothers and sisters ex parte materna had been alive. Nos. 38 and 39, and also his half-brothers and sisters ex parte paterna. Nos. 8, 9 and 9 then, under the 36th section, the half-blood ex parte materna would have been entitled equally per capita with the brothers and sisters of the whole blood. The half-blood ex parte paterna would not have taken, if the estate came from a maternal ancestor: descendants of any brothers and sisters deceased would have taken per capita and per stirpes, as the case might be, as explained in the 30th section.

Under the last clause of the 27th section, if the estate S. 27. Last came on the part of the mother (a), and the mother, clause, if estate on the part of the mother (a), and the mother, clause, if estate the same and sisters of John, and the descendants of such parte materna, brothers and sisters were dead, then the estate would go and mother. brothers and to the father, Geoffrey. This latter again varies from the sisters and descendants of the father, under which in case the estate really did dead, the fadescend ex parte materna, that is, by descent to John, from ther takes. Lucy his mother, it would not go in fee to the father, but to Andrew Baker, the father of Lucy, John Stiles' mother, subject to the tenancy by the curtesy of John's father, Geoffrey.

This 27th section varies from the Statute of Distribu-Varies from tions in this; that failing lineal descendants, personalty butions.

<sup>(</sup>a) See s. 52, and ante p. 162.

goes, one-half absolutely to the widow, and the other half to the father: whereas under this statute, the father takes all absolutely, subject to the widow's right to one-third for life, as dowress. If there be no widow, the father as being in the first degree, takes all personal estate absolutely, without regard to how the intestate acquired it; such regard is had, however in the case of reality, for if it came to the intestate on the maternal side, the father only takes a lifeestate.

#### SECTION 28

If there be no father entitled to inherit.

28. If the intestate shall die without descendants and leaving no father, or leaving a father not entitled to take the inheritance under the last preceding section, and leaving a mother and a brother or sister, or the descendant of a brother or sister, then the inheritance shall descend to the mother during her life, and the reversion to such brother or sister of the intestate as may be living, and the descendants of such as may be dead, according to the same law of inheritance hereinafter provided; and if the intestate in such case leaves no brother or sister, nor any descendant of any brother or sister, the inheritance shall descend to the mother. 14. 15 Via c. 6, s. 6.

If no descendants and no father who a mother, brother and sis-

This section is somewhat explained by what has been said in reference to the 27th. This section provides for the case can take, but of the father being dead, who otherwise would be entitled to take the inheritance; and also for the case of his being alive, and yet not entitled to take under sec. 27, by reason of the estate coming ex parte materna, and the mother or collateral relatives being alive. Thus assume that on John's death his father Geoffrey was either dead, or not entitled to take as above mentioned, and that the mother of John, and his brothers and sisters, Francis, Oliver, Bridget, and Alice, were alive: the mother would take for life, and the brothers and sisters per capita, and descendants of deceased brothers and sisters would take as provided for in the 30th section. If the brothers and sisters, and their descendants, were dead, then the estate would go to the mother. It should be mentioned that all the brothers and sisters of the half-blood would take equally with those of > whole blood under the 36th section; that is, if John re purchaser for money, all the half blood ex parte sterna and materna, viz., Nos. 8, 9 and 9, and 38, 39, 39, ould take equally with the brothers and sisters of the hole blood: but if John got the estate ex parte paterna materna, then the half-blood only on that side would ake.

Under the Stat. 1 James II., ch. 17, s. 7, the personalty The right to of an intestate who leaves no father, wife, or children, will like case. o in equal shares between his mother and brothers and isters: the above section is on much the same principle. recept that the mother takes only a life-estate in all.

SECTIONS 29, 30, 31.

29. If there be no father or mother capable of inheriting the And if there state, it shall descend in the cases hereinafter specified to the father nor pollateral relatives of the intestate; and if there be several of mother. meh relatives, all of equal degree of consanguinity to the intesate, the inheritance shall descend to them in equal parts, however emote from the intestate the common degree of consanguinity may be. 14, 15 Vic. c. 6, s. 7.

30. If all the brothers and sisters of the intestate be living, the Succession of pheritance shall descend to such brothers and sisters; and if any brothers and me or more of them be living and any one or more be dead, their descendhen to the brothers and sisters and every of them who are living, ants. ind to the descendants of such brothers and sisters as have died. that each brother or sister who may be living, shall inherit such hare as would have descended to him or her, if all the brothers or iters of the intestate who have died leaving issue had been ving, and so that such descendants shall inherit in equal shares share which their parent, if living, would have received. <sup>5</sup> Vic. c. 6, s. 8.

31. The same law of inheritance prescribed in the last section As to such tall prevail as to the other direct lineal descendants of every descendants in unequal rother and sister of the intestate, to the remotest degree, when-degrees. Fer such descendants are of unequal degrees. 14, 15 Vic. c. 6, s. 9.

These sections assume there are no lineal descend- In cases where ats, father, or mother, and provide for cases of descent to rents living.

collaterals

collateral relatives, as brothers, sisters, and their dea ants, as next entitled, and the mode in which they take. The mode of taking hereby presented as retaking per stirpes or per capita is somewhat simil that presented under sections 24, 25, and 26 in referen children of intestate and their descendants.

This section if unrestrained by subsequent sec would admit equally all collateral relatives of equal de of consanguinity to the intestate, and allow ther uncles and aunts to share with nephews and nieces, if classes were the only relatives on death of the intestates were the only relatives on death of the intestates. The principle on which they proceed is, collateral kindred claiming through the nearest and are to be preferred to collateral kindred claiming through the grandfather.

Husband and wife may each share.

The unity in law of husband and wife will not apprehended, prevent each taking the several portions would respectively have been entitled to if unma Thus if a nephew of the intestate, son of his deceased broshould intermarry with his cousin, daughter of an deceased brother, niece of the intestate, and there si be other nephews and nieces, the husband and wife each take a share (a). The same principle applies a section 35, as to uncles and aunts.

Instance of descent under these secs.

An illustration of the mode of descent under sections may be made thus: assume John to have leaving him surviving only his brother Francis; at and B, two sons of his brother Oliver; and D, and E grandsons of Oliver by a deceased son of his, C. He the claimants are collateral relatives of unequal degre consanguinity to intestate, being one brother, two nepl and two grand-nephews; and a mixed descent, per st and per capita takes place; per stirpes in dividing bet

<sup>(</sup>a) Knapp v. Windsor, 6 Cush, 156.

he unequal degrees. per capita between the equal degrees. Thus A and B between themselves shall take equally, so uso shall D and E; but taking A and B together as of me class, and D and E together as of another class, they ake unequally as being of unequal degrees of consanguinity intestate. The result of the above is that Francis takes me-half; A and B two-thirds, or each one-third of another ulf; and D and E one-third, or each one-sixth of such ulf: in other words. Francis six-twelfths. A and B each we-twelfths, and D and E each one-twelfth.

The mode of descent prescribed by these sections agrees Comparison omewhat with the prior law, except that under the latter with old law, and Statute of he eldest brother and his lineal descendants took by the Distributions. aw of primogeniture to the exclusion of younger brothers and their descendants, and it was only among females that qual division took place; and the half-blood were not adnitted as favourably as now by section 36. It agrees also with the Statute of Distributions with these exceptions: st. That as to personalty, the widow, if any, will take a noiety absolutely, and the residue go to the brothers and isters; whilst as to realty, the brothers and sisters now ake all, subject to the right of dower of the widow, viz., me-third for life; 2nd. Under that statute the right of \*presentation is confined to children, and under the Staate of Victoria extended to descendants of the brothers ad sisters deceased of the intestate. Both statutes also ostpone grandfather and grandmother to brothers and isters, though all are in equal degree.

#### SECTION 32.

32 If there be no heir entitled to take under any of the pre- If there be no ding ten sections, the inheritance, if the same shall have come heir under the the intestate on the part of his father, shall descend:

sections.

Firstly.—To the brothers and sisters of the father of the inteste in equal shares, if all be living;

Secondly.-If one or more be living, and one or more have died aving issue, then to such brothers and sisters as are living, and the descendants of such of the said brothers and sisters as have ed, in equal shares;

Thirdly,—If all such brothers and sisters have died, then to their descendants; and in all such cases the inheritance shall descend in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate. 14, 15 Vic. c. 6, a 10

When no descendants, father, mother, brothers or their descendants, and estate came exparte paterna, uncles and aunts exparte paterna take.

This section provides for cases previously unprovided for viz. cases in which the intestate leaves no issue or father mother, brother or sister, or their descendants, and assume the estate to have come ex parte paterna. under the Statute of William, the estate would have gone to George Stiles, the grandfather; and at common law would have gone, not to George, but to his children viz the brothers and sisters of the father of the intestate. (No 11.) by primogeniture. The present section adheres to the preference formerly given to the blood of the purchaser and sends the estate also in the same way as the common law, except that it does not go by primogeniture, but to al equally. Under the second clause of this section it will b seen, that it does not very distinctly appear whether the descendants of such brothers or sisters as are dead take, pe stirpes or per capita, with the surviving brothers and sisters; it would seem however, that by force of clause they would take per stirpes or per capita according to the degrees of consanguinuity, in the same manner as befor explained in regard to children or brothers of the intestate and their descendants.

Comparison with Stat. of Distributions.

This section, and those following vary in principle from the course of succession under the Statute of Distribution under which the grandfather or grandmother would exclud the uncles and aunts, the latter being in the third and the former in the second degree to intestate (a). The Statut of Victoria, however, postpones all lineal ancestors beyon the father and mother, (unless, indeed, they can take undesection 37); and in preference to a grandfather or grandmother, will give the estate to even a remote descends of an uncle or aunt; a variance from the law of personalt which appears at first sight somewhat harsh, but may be a succession of the law of personalt which appears at first sight somewhat harsh, but may be a succession of the law of personalt which appears at first sight somewhat harsh, but may be a succession of the law of personalt which appears at first sight somewhat harsh, but may be a succession of the law of personalt which appears at first sight somewhat harsh, but may be a succession of the law of personalt which appears at first sight somewhat harsh, but may be a succession of the law of personalt which appears at first sight somewhat harsh, but may be a succession of the law of personalt which appears at first sight somewhat harsh, but may be a succession of the law of personalt which appears at first sight somewhat harsh, but may be a succession of the law of personalt which appears at first sight somewhat harsh, but may be a succession of the law of personalt which appears at first sight somewhat harsh, but may be a succession of the law of personalt which appears at first sight somewhat harsh, but may be a succession of the law of personalt which appears at first sight somewhat harsh, but may be a succession of the law of personalt which appears at first sight somewhat harsh, but may be a succession of the law of personalt which appears at first sight somewhat harsh, but may be a succession of the law of personal the law of personal the law of personal the law of personal the law of person

<sup>(</sup>a) Ante pp. 117, 134.

instified on the ground taken by Lord Hardwicke (a), "that it would be a great inconvenience to carry the portions of children to a grandfather, who must be supposed to have been provided for, and may probably be in a dying condition and not want it: and it would be contrary to the very nature of provisions among children, as every child may be said to have spes accrescendi." The case before Lord Hardwicke was, it is true, a case wherein the contest was between a grandfather and a brother of an intestate, both of whom by the civil law mode of computation are in equal degree to the intestate, and therefore in strictness entitled to equal shares: still the reasoning applies to uphold the equity of this section, and there can be little object and much inconvenience in giving the estate for a probably brief period, to an infirm and aged grandsire whose wants and capacity to enjoy may be small, and on whose death the estate might shortly have to be submitted to another descent.

## SECTION 33.

33. If there be no brothers or sisters, or any of them, of the Further profather of the intestate, and no descendants of such brothers or vision. sisters, then the inheritance shall descend to the brothers and sisters of the mother of the intestate, and to the descendants of such of the said brothers and sisters as have died, or if all have died, then to their descendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the father. 14, 15 V c. 6, s. 11.

This section provides for cases not before provided for, Failing paterviz, the case of no lineal descendants, father, mother, nal uncles and brother, sister, or uncles or aunts, ex parte paterna, or their their descenddescendants, and the estate coming ex parte paterna; in ants, the material take in ach case the estate is to go to the uncles and aunts ex parte cases of ancesmaterna and their descendants, as if they had been uncles tral paternal estate. and aunts ex parte paterna. Thus, the issue of Andrew and Esther Baker (No 41) would take. This is a great infringement on the prior law, for under it those claiming

ex parte materna could never take till the whole pat line were exhausted.

## SECTION 34.

Further provision if the estate came by the mother's side. 34. In all cases not provided for by the twelve next precedions, where the inheritance shall have come to the int on the part of his mother, the same, instead of descending the brothers and sisters of the intestate's father, and their descents, as prescribed in the preceding thirty-second section, descend to the brothers and sisters of the intestate's mother to their descendants, as directed in the last preceding sec and if there be no such brothers and sisters or descendant them, then such inheritance shall descend to the brothers sisters, and their descendants, of the intestate's father, as b prescribed. 14, 15 V. c. 6, s. 12.

Estate coming ex parte materna, maternal uncles, &c., take before paternal.

Section 34 provides for failure of lineal descendant father and mother, of brothers and sisters and their scendants, where the estate comes ex parte materna. is the same as provided for under the 32nd and 33rd sect except that under those the estate is assumed to com parte paterna. The descent under the 34th sectio governed by the same principle as under the 32nd and but as the estate comes ex parte materna, it goes fir uncles and aunts on the maternal side and their descants, and if none, then to uncles and aunts on the pate side and their descendants, per stirpes or per capita the principles before mentioned, according as the heirs or are not in equal degrees of consanguinity.

#### SECTION 35.

If it came neither on father's nor mother's side.

35. In cases where the inheritance has not come to the itate on the part of either the father or the mother, the inherishall descend to the brothers and sisters both of the father mother of the intestate in equal shares, and to their descend in the same manner as if all such brothers and sisters had the brothers and sisters of the intestate. 14, 15, V. c. 6.4

If estate came Under the 35th section if the estate came neither ex parts paterna paterna or materna, as if the intestate were a purch

for money, or by gift from no relative, then no preference or materna, is given on either side, but the uncles and aunts and their then no predescendants on both sides take together: the descendants to collaterals taking per stirpes or per capita as the case may be: a on either side. further infringement on the prior law which would have postponed the maternal relatives.

Before leaving the right of inheritance of uncles and Right under sunts, it may be remarked that they are placed by this Stat. of Dirtributions. statute, in one respect, in a more favorable position than under the Statute of Distributions: for under the latter they are, as in the third degree, postponed to grandfathers and grandmothers who are in the second degree. On the other hand the Statute of Victoria postpones them to brothers and sisters of the intestate and their descendants. whilst as to personalty they take equally with nephews and nieces of the intestate, as being in the same degree.

## SECTION 36.

36. Relatives of the half blood shall inherit equally with those Half-blood to of the whole blood in the same degree, and the descendants of such whole blood. relatives shall inherit in the same manner as the descendants of unless estate the whole blood, unless the inheritance came to the intestate by came from andescent, devise or gift of some one of his ancestors; in which case all those who are not of the blood of such ancestors shall be exduded from such inheritance. 14, 15, V. c. 6, s. 14.

In reference to section 36, it will be observed that if the intestate were the purchaser (in the strict sense of the word). relatives of the half-blood, both on the paternal and materal side would take equally with relatives of the whole blood in the same degree. This was a double infringement Double inon the prior law, since as before explained, under it where tringement of the intestate was purchaser, the relatives of the half-blood the old law. on the mother's side were postponed till failure of all the male paternal and female paternal ancestors and their descendants; and those of the half-blood on the paternal side were admitted only after failure of those of the same degree of the whole blood and their descendants: but under section 36 if the intestate were purchaser, and had brethren of the

but accords with Stat. of Distributions.

half-blood on the father's and mother's side, and a brother of the whole-blood, the latter would only share equally This accords with the Statute of Diswith all the others. tributions, under which also no distinction is made as to how the intestate acquired the property.

But if estate . ancestor, the on that side excluded.

If however the estate came to the intestate by descent. came from an devise, or gift, from some one of his ancestors, then those half blood not who are not of the blood of such ancestor, are to be excluded from the inheritance: which latter rule would seem to be somewhat harsh in a case, for instance, where the next

from an ancescollateral relative of ancestor, as other sections do.

Only refers to heirs would be very remote. And here also it may be reestate coming marked that this section is not worded as the other sections tor, not from are when alluding to estates ex parte paterna or materna. as the case may be, "when the estate shall have come to the intestate on the part of the father," &c., which would include, by force of the 52nd section, any gift or devise from any RELATIVE of the blood of the father or mother, but the section refers only to the estate coming from an ancestor, and is not touched by section 52.

Sense of word ancestor.

In the United States, however, it has been held that the word "ancestor" is not to be construed in its strict sense. and that a vounger brother may be the ancestor of his elder brother. Thus E P purchased certain lands, and died intestate, leaving I P and J P his sons and heirs, and B. his widow, married again. Before birth of issue of the second marriage, I P died intestate, and without issue; J P inherited to him and afterwards died intestate without issue. At the time of his death there was issue of the second marriage. It was held that I P was the ancestor of J P, and that on death of J P his half-brother took the moiety descended from I P (a). It must be observed however, that this decision was not on such sections as the 36th and 52nd, which have in them the difference of lateguage above pointed out, but on a clause regulating descent general terms, as in section 23, and the language was, "where any person shall die intestate having title, &c., which title

<sup>(</sup>a) Prickett v. Parker, 3 Ohio, 394,

shall have come to the intestate by descent, devise, or gift from any ancestor, such estate shall descend, &c."

There is in the latter part of this section a mistake in Mistake in rereferring to ancestors in the plural. The American Statcestors in the utes refer only to the ancestor from whom the estate has the plural. come, and whose blood is requisite in the half-blood seeking to inherit. It is manifest that the following observations of a learned American judge (whose able judgment on a statute very similar to this is worthy of great consideration), apply with additional force where ancestors generally are referred to, instead of (as in the case before him) the particular ancestor from whom the estate has come. He says (a): "Soaring on the wings of fancy, remembering only that all mankind are descended from the same common parents, with the aid of genealogical tables sufficiently extensive, and of a herald who is master of his art, the blood of the first purchaser would have indeed no bounds but the veins of all mankind" (b). The question before the court was whether, where the intestate had inherited from her mother, who had inherited from the intestate's grandfather, the half-brethren of the intestate, being children of her father on his first marriage

<sup>(</sup>c) Doe d. Delaplaine v. Jones, 3 Halstead, 340. See also as to half- The half-blood, and that "the blood" of the ancestor includes his relations of the blood. half blood; 2 Pet. 58; 5 Whart. 477; 2 Hals 340; 14 N. Y. Rep. 235.

<sup>(</sup>b) Considering the statistics as to illegitimacy, it is to be feared that even the Royal College of Heralds, and Garter, Lyon, and Ulster Kingsstarms, though aided by genealogical tables extending to the first geological period, would be baffled by many a bar sinister, and the stern common law rule, qui ex damnato coitu nascuntur inter liberos son computentur. Blackstone states, as such "have no legal ancestors, they can have no collateral kindred," indeed he says, "they have no blood in them," which remark is considerably opposed to the unlimited amount of blood ascribed to a first purchaser by the learned American Judge; a purchasing bastard, as nullius filius, being necessarily a first purchaser. The consequence is, so many purchasing bastards there have been, so many persons are there, who, according to the common law, as regards descent and blood relationship, occupy the position of our first parents; they "have no legal ancestors, they can have no collateral kindred." On an escheat also at common law, in the case of an attainted felon, "The channel which conveyed the hereditary blood from attainted felon, "The channel which conveyed the hereditary blood from his ancestor to him, is not only exhausted for the present, but totally dammed, and rendered impervious for the future."—2 Blackstone, 254.

As to blood relationship. with the intestate's sister, could inherit in preference uncles of the intestate, brothers of her mother. held that the blood relationship of the half-blood to intestate's mother could be made out by tracing back her father, the common ancestor.

In the same case also one learned Judge said: "If i answered that the half-blood must not look back so fa Adam or Noah, it is all I want, for then some restrictive admitted to be implied, and the only dispute will be a that restriction is. I contend for the restriction of m mitv as established by the Legislature in the Act conc ing descents; such is a legal restriction, and will make proviso (excluding the half-blood not of the blood of ancestor.—ED.) vield us a sensible and a practicable r

Under a statute directing that the "estate shall g the kin next to the intestate, of the blood of the pe from whom such estate came or descended" to the inter it was held that a father is of the blood of his daug within the Act, and the maternal grandfather of the in tate would take an estate descended to the intestate f her mother, to the exclusion of brothers and sisters of mother (a).

### SECTION 37.

If there be failure of heirs the rules of Distribution govern.

37 On failure of heirs under the preceding rules, the in tance shall descend to the remaining next of kin of the intes under Statute according to the rules in the English Statute of Distribution the personal estate. 14, 15 V. c. 6, s. 15.

> The mode of distribution under this Act is given ! after (b).

### SECTION 38.

Co-heirs to take as tenants in common.

38. Whenever there shall be but one person entitled to in according to the provisions of the twenty-second and follo sections of this Act, he shall take and hold the inheritance so and wherever an inheritance, or a share of an inheritance,

<sup>(</sup>a) Cole v. Battey, 2 Curtis C.C. 562; see also as to blood relation Gardner v. Collins, 2 Peters 58; Champlin v. Baldwin, 1 Paige, p. 177; and as to ancestral estates, see remarks under s. 52.

(b) Post p. 204.

seemd to several persons under such provisions, they shall take tenants in common, in proportion to their respective rights. l. 15 V. c. 6, s. 16.

Section 38 in providing that an estate shall descend to Annuls desore than one as tenants in common, virtually abolishes cent in coparescent in co-parcenary.

# SECTIONS 39, 40, 41.

39. Descendants and relatives of the intestate begotten before Descendants. is death, but born thereafter, shall in all cases inherit in the &c., born after death of me manner as if they had been born in the lifetime of the in-intestate, to state and had survived him. 14, 15 V. c. 6, s. 17.

- 40 Children and relatives who are illegitimate shall not be en-Illegitimate 14, 15 persons not to tled to inherit under any of the provisions of this Act. ່. c. 6. s. 18.
- 41. The estate of the husband as tenant by the curtesy, or of Curtesy, dowwidow as tenant in dower, shall not be affected by any of the pro- er and estates isions of the last preceding nineteen sections of this Act, nor shall will excepted. 16 same affect any limitation of any estate by deed or will, or by estate which, although held in fee simple or for the life of wither, is so held in trust for any other person, but all such estes shall remain, pass and descend, as if the last nineteen sections this Act numbered from twenty-two to forty both included, ad not been passed. 14, 15 V. c. 6, s. 19.

Section 41 expressly excepts estates vested in trustees. Estates vested he whole inconvenience of partible inheritances in making in trustees excepted from title, would result without any benefit, if the act had not the act. ccepted these estates. The interests of the cestuis qui ust, however, under section 50 will descend under the act: 1e reference in that section to section 40 is a mis-print, it would refer to 41.

# **SECTIONS 42, 43, 44, 45.**

42. If any child of an intestate shall have been advanced by Case of childle intestate by settlement, or portion of real or personal estate, ren who have both of them, and the same shall have been so expressed by been advanced by by settlement, intestate in writing or so acknowledged in writing by the &c. ald, the value thereof shall be reckoned, for the purposes of this

section only, as part of the real and personal estate of such intetate descendable to his heirs, and to be distributed to his next of kin according to law: and if such advancement be equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the decessed, as above reckoned, then such child and his descendants shall be excluded from any share in the real and personal estate of the 14, 15 V. c. 6, s. 20,

If such advancement be not equal.

43. If such advancement be not equal to such share such child and his descendants shall be entitled to receive so much only of the personal estate, and to inherit so much only of the real estate of the intestate, as shall be sufficient to make all the shares of the children in such real and personal estate and advancement to be equal, as near as can be estimated. 14, 15 V. c. 6, s. 21.

Value of property advanc-ed, how estimated.

44. The value of any real or personal estate so advanced shall be deemed to be that, if any, which may have been acknowledged by the child by any instrument in writing, otherwise such value shall be estimated according to the value of the property when 14, 15 V. c. 6, s. 22.

Education. &c., not advancement.

45. The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement within the meaning of this Act 14, 15 V. c. 6, s. 23.

Precaution reco-heir.

The provisions of these sections show the necessity of quisite on precaution and enquiry as to advancement on purchase from one claiming as co-heir.

New York act.

These sections are as those of the New York revised Act (a) with this exception, that the latter does not require any writing as evidence of the advancement. of Distributions has somewhat similar provisions, as will be hereafter explained.

American decisions.

Under the the Statutes of Descent and of Distribution of personalty (b) in New York, the rule required by equity, and that intended by the statutes is, that advancement made by real estate should go first against real estate de-

<sup>(</sup>a) See ante p. 167 as to this Act.

<sup>(</sup>b) 2 Rev. Stat. N. Y., p. 97; see ed. by Denio and Tracey at Osgoods Hall vol. 2, p. 283.

aded, and be charged on the shares of heirs, and against se who represent those shares: while on the other hand ancements made in personal estate, or money, should be ounted for in the distribution of the personalty, and be rged on the next of kin as such, and on the shares ich thev represent (a).

t would seem that these sections will not apply unless Do these secre be a total intestacy. The act speaks of the child of tions apply except in case intestate, and in strictness a person cannot be said to die of total intesestate if there be a will, though part of his property be tacy? disposed of. The decisions under the Statute of Distritions (b) and under the New York Act (c) go to shew t short of total intestacy these sections do not apply.

The Act speaks of the child of an intestate being advanced, Do they ex-Mr. Chancellor Kent does not consider it as quite tend to grand. ir that this would extend to a grandchild, or rather as ards the American Acts he says that "it would have n better if the statutes had been more explicit, and not re imposed on the courts the necessity of extending by struction and equity the meaning of the word 'child,' as to exclude a grandchild who should come unreaably to claim his distributive share when he had eady been sufficiently settled by advancement" (d). may be gathered however that the impression of the med Chancellor was that the word "child" would exd to remoter lineal descendants, and he refers to authoies as in favor of that view (e): if he did not express a sitive opinion on the subject, it was probably only by Won of the language of other American Acts on the same

a) Supreme Court, Perry v. Dayton, 31 Barb. 519; Abbott's Digest 6, p. 6.

b) See Wm's. Exrs. 6th ed. vol. 2, p. 1387, post p. 200.

c) 5 Paige, 450. Thompson v. Carmichael, 3 Sandf. Ch. 120; 4 Kent m. 11th ed. 463. Abbott's Digest, vol. 1, p. 35.

d) 4 Kent Com., 11 ed. 463.

<sup>(</sup>e) Wyth v. Blackman, 1 Ves. Sr. 196; Royle v. Hamilton, 4 Ves. 1; Dickinson v. Lee, 4 Watts 82. But see the construction in wills, delifie v. Buckley, 10 Ves. 195; Pride v. Fooks, 3 De G. & J. 252; d Orford v. Churchill, 3 V. & B. 59; and see also Con. St. c. 73, 16 & 17, and the remarks thereunder.

subject, some of which expressly extend to descendar some to grandchildren, and some to issue.

Difference as to advancement under Stat. of Distributions. New York act. and this act.

On questions of advancement the decisions under t Statute of Distributions hereafter referred to may be service, as also those of the State of New York (a): but applying them the distinction between this Act and the must be borne in mind. Thus for instance, the Statute Distributions does not require there should be any expr sion by the intestate or the child in writing, and only plies to intestate fathers, nor is it as express in its provision as section 45; the Act of New York also does not requ writing as evidence of the advancement.

Decisions advancement on Stat. of

The question of advancement under the Statute Distributions is treated of in Williams on Executors (b) Distributions, follows :-

> "The fifth section provides that no child of the int tate, except his heir-at-law, who shall have any est in land by the settlement of the intestate, or who st be advanced by the intestate in his lifetime by pecunia portion, equal to the distributive shares of the other d dren, shall participate with them in the surplus; bu the estate so given to such child by way of advancem be not equivalent to their shares, then that such I of the surplus as will make it so shall be allotted to ! or her (c).

> This just and equitable provision has been also said be derived from the collatio bonorum of the Imperial k which it certainly resembles in some points, though it fers widely in others: but it may not be amiss to obse that with regard to goods and chattels, this is part of ancient custom of London, of the Province of York, and the sister Kingdom of Scotland; and with regard to lands descending in co-parcenary, that it has always be and still is, the common law of England, under the me of hotch-pot (d).

<sup>(</sup>a) Abbott's Digest vol. 1, p. 35; Kent Com. vol. 4, 11th ed., p.

<sup>(</sup>b) Wms. on Exrs. 6th ed. vol. 2, p. 1386.

<sup>(</sup>c) 2 Black. Comm. 516.

<sup>(</sup>d) 2 Black. Comm. 517.

This provision applies only to the distribution of the estates of intestate fathers; and therefore, if a mother, being a widow, advances a child, and dies intestate, leaving many children, the child advanced shall not bring what he received from his mother into hotch-pot. This was decided by Lord King, C., on the principle that the statute was grounded on the custom of London, which never effected a widow's personal estate, and that the act seems to include those alone within the clause of hotch-pot, who are capable of having a wife as well as children, which must be husbands only (a).

The statute takes nothing away that has been given to any of the children, however unequal that may have been: how much soever it may exceed the remainer of the personal estate left by the intestate at his death, the child may, if he pleases, keep it all; if he be not contented, but would have more, then he must bring into hotch-pot what he has before received. This manifestly seems to be the intention of the Act, grounded upon the most just rule of equity, equality (b).

The provision in the statute applies only to the case of actual intestacy; and where there is an executor, and consequently a complete will, though the executor may be declared a trustee for the next of kin, they take as if the esidue had been actually given to them: therefore, a hild advanced by his father in his life, or provided for the will, cannot be called on to bring his share into hotch-pot (c).

If a child, who has received any advancement from his ther, shall die in his father's lifetime, leaving children, ch children shall not be admitted to their father's distritive share, unless they bring in his advancement; ce, as his representatives, they can have no better im than he would have had, if living (d).

<sup>(</sup>a) Holt v. Frederick, 2 P. Wms. 357. S. C. 2. Eq. Cas. Abr. 446.

<sup>(</sup>b) By Lord Raymond, in Edwards v. Freeman, 2 P. Wms. 443.

By Sir W. Grant, in Walton v. Walton, 14 Ves. 324, 2 P. Wms. 0, 446; see also Vachell v. Jeffreys, Prec. Chanc. 169.

<sup>(</sup>d) Proud v. Turner, 2 P. Wms. 560.

A child advanced in part shall bring in his advancement only among the other children; for no bene shall accrue from it to the widow (a).

It will be convenient to consider this subject further.

1. With respect to children who have any land by settle. ment of the intestate.

2. With respect to children who have been advanced by pecuniary portions.

The statute extends not only to land freehold and copyhold settled on a younger child by the father, but also to charges upon land for such child (b): so if a father settle a rent out of his lands on a younger child, this is within the statute (c) and and so is a reversion settled on any child but the heir (d).

Land claimed by marriage settlement has been held an advancement within the statute; but land devised by the father to a younger child is not to be so considered: for a provision to be brought into hotch-pot must be such as is made by an act in the intestate's lifetime, and not by will (c).

Money laid out by the intestate on repairs of houses, which had been given, but not conveyed, by him to his eldest son, and which had therefore descended on him as heir-at-law, has been held not to be an advancement to be brought into hotch-pot under the statute; though it would have been otherwise if the father in his lifetime had irrevocably parted with the estate by a conveyance to the son and afterwards given him a sum of money to ameliorate it \( \frac{1}{2} \).

2. With regard to children who have been advanced by pecuniary portion. By the provisions of the statute, although the heir-at-law shall not abate in respect of the land which came to him by descent, or otherwise from the intestate, yet, if he hath had any advancement from his

<sup>(</sup>a) Ward v. Lant. Prec. Chanc. 182, 184; Kircudbright v. Kircudbright, S Ves. 51, 64. (b) By Sir Joseph Jekvil, 2 P. Wms. 441. (c) 2 P. Wms. 441. (d) 2 P. Wms. 442.

<sup>(</sup>c) Nr Sir J. Jekvil. 2 P. Wms. 440: Twisden v. Twisden, 9 Vot. 423, 462, by Lord Eldon. (f) Smith v. Smith, 5 Vet. 721.

of his personal estate, he shall abate for it in manner as the other children (a): and were it use of furniture for his life, it shall be regarded uncement  $pro\ tanto\ (b)$ .

esses shall also, it seems, bring in such advancebeing land (c), as they may have respectively rom their father, before they shall be entitled istributive share, agreeably to the principle of and to the object of a just and impartial father e an equality among his children (d)

uins to consider what is, and what is not, to be is an advancement out of the personal estate of so as to exclude a child from a distributive share ole or part of the residue.

sion made for a child by a settlement, whether, or for a good consideration, as that of marriage, advancement (e).

ot requisite, to constitute an advancement, that ion should take place in the father's lifetime (f). I he settle an annuity, to commence after his one of his children, it is an advancement (g). So secured to the child, although in future, is an ent (h). Thus a portion for a daughter, to be of land, on her attaining the age of eighteen, or of her marriage, was held to be an advancement en she married, although she was under that age, rried, at the time of the intestate's death (i).

on which was at first contingent, shall clearly be l an advancement, when the contingency has

v. Pratt. Fitzgib, 285 Com. Dig. Admon (H.) 4 Burn, E. L., t.; Smith v. Smith, 5 Ves. 721.

v. Pratt, Fitzgib. 285, Com. Dig. Admon (H) Kircudbright ight, 8 Ves. 51.

illon v. Coppin 4 M. & Cr. 647.

n, E. L. 397, 8th edit. Toller, 378.

rds v. Freeman, 2 P. Wms. 440, 441; Phiney v. Phiney, 2
(f) 2 P. Wms. 445.

<sup>Wms. 442; Swinb. Pt. 3, s. 18 pl. 25. (h) 2 P. Wms. 445.
rds v. Freeman, 2 P. Wms. 435; S. C. 1 Eq. Cas. Abr. 2 Eq. Cas. Abr. 446, pl. 3,</sup> 

happened (a). And it seems that a portion, even while contingent, being capable of valuation, may be brought into hotch-pot (b): or the Court may order that in case the contingency shall happen, the portion shall be so distributed as to make the rest of the children equal with the child on whom it was settled (c): but the contingency must be so limited as necessarily to arise within a reasonable time; as in the case stated above, where the portion was secured to the daughter, on her attaining the age of eighteen, or on her marriage (d).

Where a father makes a provision for a son on his marriage, all the limitations in such settlement to the wife and children of such son must be considered as part of that advancement; and it is not the son's estate for life only that ought to be valued, and brought into hotch-pot (e).

With respect to the sort of benefit which shall constitute such advancements, it has been held, that if a father buy for a son an advowson, or any other ecclesiastical benefice, or if he buy him any office, civil or military, these are to be considered as advancements, either partial or complete, according to the comparative value of the estate to be distributed (f). And although the office be only at will, as a gentleman pensioner's place (g), or a commission in the army (h), it is to be regarded in the same light.

An annuity is an advancement to be brought into hotchpot (i), viz., the value at the date of the grant; or, if it has ceased, the payments received, at the option of the child (k).

<sup>(</sup>a) 2 P. Wms. 442. (b) 2 P. Wms. 442, 449; Toller 377.

<sup>(</sup>c) 2 P. Wms. 446; Toller 378.

<sup>(</sup>d) 2 P. Wms. 440, 445, 449; Toller 378.

<sup>(</sup>e) Weyland v. Weyland, 2 Atk. 635; see Dillon v. Coppin, 4 M. & Cr. 647, 669.

<sup>(</sup>f) Hender v. Rose, 3 P. Wms. 317, note to Pusey v. Desbouverie-

<sup>(</sup>g) Norton v. Norton, 3 P. Wms. 317, note.

<sup>(</sup>h) Kircudbright v. Kircudbright, 8 Ves. 63.

<sup>(</sup>i) Swinb. Pt. 3, s. 18, pl. 29.

<sup>(</sup>k) Kircudbright v. Kircudbright, 8 Ves. 51.

In a modern case a father lent the sum of £10.000 to his on, to assist him in forming a partnership in the business a sugar refiner, and took his promissory note for the payment of that sum on demand: it appeared that it was consequence of the urgent desire of the intestate that the n engaged in the business; and that finding it was a sing concern he became desirous of retiring from it. but at the father urged him to continue it; that, at the mest entreaty of the intestate, he, with much reluctance. ntinued the business, and sustained heavy losses in it. he father on his death-bed caused the promissory note to burned, and died intestate: Sir John Leach, M. R., held. 1st. although the circumstances under which the note had men destroyed amounted to an equitable release of the bt, yet that the sum which remained due upon it must be insidered an advancement to the son (a).

On the other hand, small inconsiderable sums of money ven to a child by the father, or mere trivial presents he may ake to a child, as of a gold watch, or wedding clothes, shall it be deemed an advancement (b): nor shall money expendibly the father for the maintenance of a child, nor given to ind him an apprentice, nor laid out in his education at hool, at the university, or on his travels (c).

It is presumed, indeed, that a distinction must be made hen a considerable sum of money is advanced by the ther with the child as a premium for instruction, and not erely as a compensation for maintenance, and that the rmer sum is in strictness liable to be brought into hotchot (d). In allusion to this distinction, it is conceived that ord Hardwicke expressed himself in *Morris* v. *Burroughs* ): "I should think," said his Lordship, "that if a father

<sup>(</sup>a) Gilbert v. Wetherell, 2 Sim. & Stu. 254. As to what constitutes advance in money, within the meaning of that expression, see leter v. Powell, 31 Beav. 583, 1 De G. J. & S. 99.

b) 3 P. Wms. 317, note to Pusey v. Desbouverie; Elliott v. Collier, Sec. 16. S. C. 3 Atk. 528: nor, says Swinburne, money in his to spend among his equals, or buy him suits of apparel, or books, mour for the service of his country: Swinb. Pt. 3, s. 18, pl. 30.

<sup>)</sup> Swinb. Pt. 3, s. 18, pl. 19. Bac. Abr. tit. Exors (K).

<sup>&</sup>lt;sup>1</sup> 2 Rop. Husb. & Wife, 12. (e) 1 Atk. 403.

should give money to put a son out apprentice, or advance him in life by setting him up in trade, &c., that would have the same effect," i. e., will be a satisfaction of the custom, or must be brought into hotch-pot, as the case may happen to be.

It has already been stated, that a provision which a father may make for his child by will, in a case where the testator dies intestate as to part of his personal estate, shall not be brought in hotch-pot (a). Such a provision as shall be construed an advancement must result from a complete act of the intestate in his lifetime (b), by which he divested himself of all property in the subject: though, as it has just appeared, it is not requisite that it should take effect in possession till after his death (c). Still less shall property given or bequeathed to the child by and other person be so denominated (d); and least of all shear of fortune of his own acquisition, however great" (e).

# SECTIONS 46, 47, 48, 49.

As to the purchase by any of the parties interested of real estate, subject to partition.



estate according to law, shall receive from any of the person entitled to a share of such real estate, an offer or proposition purchase the share or shares of the other parties interested there is giving the preference to the person who would have been the heir-at-law thereto, had the twenty-second and following sections of this Act not been passed; and next after such heir-at-law, giving such preference to the several persons successively who would have been such heir-at-law, had the said last mentioned sections of this Act not been passed, and had those persons preceding them respectively in the series of such preference been dead at the time of the death of the intestate.

Particulars of offer to purchase to be certified by the court.

47. The parties so authorized to make such partition, sheall certify particularly to the Court in which proceedings for a partition may be commenced or pending, the particulars of such offer or proposition for purchase, the nature, quantity and value

<sup>(</sup>a) Wms. Exrs. p. 1387, 14 Ves. 324,

<sup>(</sup>b) 2 P. Wms. 440; Toller, 380.

<sup>(</sup>c) Wms. Exrs. p. 1389; Toller, 380.

<sup>(</sup>d) Swinb. Pt. 3, s. 18, pl, 18. Bac. Abr. tit. Exrs. (K). Toller, 3

<sup>(</sup>e) Swinb. Pt. 3, sec. 18, pl. 18. Bac. Abr. tit. Exors. (K).

be estate or share proposed to be purchased, and whether they ise such offer or proposition to be accepted or rejected, and ir reasons therefor.

- 8. Any Court authorized to make partition of real estate. Any court 7 direct a sale of the same if they think it right so to do, upon authorized to make partition application of any of the parties beneficially interested there, may direct a giving however the preference at all times to the person who sale, giving ild have been the heir-at-law to such real estate had the nty-second and following sections of this Act not been passed. after such heir-at-law, then giving such preference to the ral persons successively who would have been such heir-at-law the said last mentioned sections of this Act not been passed. had those persons preceding them respectively in the series ich preference been dead at the time of the death of the state.
- 3. Every such preference shall be upon and subject to such Terms on s, security and conditions as the Court may think it right which preference to be irect. 14, 15 V. c. 6, s. 24.

given.

he right of preëmption given by these sections to those These sections successively would have taken as heirs under the involve knowher law, inseparably links this statute with that of law under the liam, and with the common law. A knowledge of the Act of Wm. law will continue necessary for this cause alone, indedently of the fact that the estate of trustees will descend refore this Act (sec. 41), and that estates tail are not hin its operation (sec. 23).

he Act of New York has no such provisions as in these ions, but similar provisions exist, or existed, in some tes of the Union, as Vermont, Pennsylvania, Connecit and Maryland (a).

### SECTION 50.

0. In the last twenty-seven sections of this Act numbered Interpretation a twenty-three to forty-nine both inclusive, the term "real as to sections 28 to 49. te" shall be construed to include every estate, interest and t, legal and equitable, held in fee simple or for the life of her (except as in the fortieth section is before excepted) in

<sup>)</sup> See Kent's Com.-vol. 4, 11th ed. p. 423, n. a.

lands, tenements and hereditaments in Upper Canada, but not to such as shall be determined or extinguished by the death of thein-testate seized or possessed thereof, or so otherwise entitled thereto, nor to leases for years; and the term "inheritance," as therein used, shall be understood to mean real estate as herein defined, descended or succeeded to, according to the provisions of the mid twenty-seven sections. 14, 15 V. c. 6, s. 25.

Reference to s. 40 a misprint. The reference to section 40 in this section is a misprint; it should be section 41.

The legal estate vested in a trustee will not descend according to this act, being excepted by section 41.

### SECTION 51.

Interpretation as to sections 23 to 50.

51. Whenever, in the last twenty-eight preceding sections, numbered from twenty-three to fifty both included, any person is described as living, it shall be understood that he was living at the time of the death of the intestate from whom the descent or succession came, and whenever any person is described as having died, it shall be understood that he died before such intestates 14, 15 V. c. 6, s. 26.

Section 52.

Section 52 was before treated of (a), and the meaning and effect of the expressions therein, and of the words inheritance and of the blood, were also considered in treating of sections 27, 36 (b).

Summary of descent under Stat. of Victoria.

It may now be well to give a summary of what has been explained as to the present law of descent. Assume the intestate to be the purchaser, or that the estate came on neither the paternal or maternal side; the estate will descend, first, to the lineal descendants of the intestate, and those claiming under them per stirpes or per capita according to whether the claimants are in equal or unequal degrees of consanguinity, as before explained; and subject to the law of hotch-pot, dower, and curtesy. Failing descendants, it will go to the father. If there be no father, but a mother, and brothers or sisters, or descendants of brothers or sisters; it goes to the mother for life, and the remainder

<sup>(</sup>a) Aute p. 174.

<sup>(</sup>b) Ante pp. 177, 187-

te brothers and sisters (including the half-blood) and endants of such as may be dead, per stirpes or per capita rding to the degree. If there be no father, or brother. ster, or descendant of such, it goes to the mother. If no er or mother: it will go to brothers and sisters, and endants of such, per stirpes or per capita (including the blood). Failing descendants, father, mother, brothers sisters, and descendants of brothers or sisters; then es and aunts on both paternal and maternal sides take. their descendants per stirnes or per capita as the case be. Failing the last resort, viz., uncles and aunts, and descendants, the Statute of Distributions governs. the estate came not as above supposed, but by desdevise, or gift, from the father, or some relative of plood of the father, (sections 32, 52,) it will still go ove, but the maternal uncles and aunts will be postd to the maternal uncles and aunts, and their desants: should the estate have come, however, from paternal ancestor of the intestate, it would seem in such case and in such case only, the half-blood on maternal side would be entirely excluded. (s. 36). the estate come to the intestate on the part of the er, i.e., by descent, devise, or gift, from her, or from relative of her blood (s. 52), there is more variance: in such case, failing lineal descendants, if father, er, brothers and sisters (including half-blood), or desants of brothers or sisters be living, the mother will for life, and the remainder go to the brothers and s, (including those of half blood), and their descend-; but if the mother were dead, the father would take er place for life, the remainder going over as before; it would be only in the event of there being no mobrothers, or sisters, or descendants, that the father ld take absolutely. If there were a mother and faand no brothers or sisters, or descendants, the her would take in preference to the father. Failing r, mother, brothers, sisters, and descendants of bro-3 and sisters: the maternal uncles and aunts and their

descendants will take in preference to those on the paternal side, who only take on all others entitled as above, being enhausted; and failing these the Statute of Distributions again governs. The above presupposes that the estate came from some relative of the blood of the mother, and not from the mother or other maternal ancestor; for in the latter case apparently the half-blood on the paternal side would be excluded, (s. 36).

In any event the right of dower and tenancy by the curtesy attaches, according as permissible before the statute, which gives the descent subject to those claims.

Right of succession to personalty under Stat. of Distributions.

The right of succession to personal estate under the Statute of Distributions is is governed by 22 & 23 Car. 2 ch. 10. explained by 29 Car. 2 ch. 30, by which it is enacted that the surplusage of intestates' estates, (except of femes covert, which were left as at common law) (a), shall, after the expiry of one full year from the death of the intestate, be distributed in the following manner: one-third to the widow of the intestate; and the residue in equal proportions to his children, or if dead, to their representatives, that is, their lineal descendants, per stirpes or per capita. according as the parties are in equal or unequal degrees of consanguinity to the intestate, in like manner as they would inherit real estates, as before pointed out in treating of ss. 24, 25. If there are no children or legal representatives subsisting, then a moiety to the widow, and a moiety to the next of kindred in equal degree and their representatives. If no widow the whole shall go If neither widow nor children, the to the children. whole shall be distributed among the next of kin in equal degree and their representatives; but no representatives are admitted among collaterals, farther than the children of the intestate's brothers and sisters. Brothers and sisters, and children of deceased brothers and sisters will

<sup>(</sup>a) See Con. Stat. 73. s. 17, the separate estate of an intestate married woman goes to her husband and children as the personalty of an intestate husband would go to his widow and children, and if there be so children, then as if the Act had not been passed, and thus the husband would be entitled to the whole as entitled to administration.

ke per stirpes or per capita according to the degrees, they would inherit real estate as before mentioned unr section 30. The right to take by representation nong collaterals being confined to children of brothers d sisters, a son of a deceased uncle will not be entitled share with an uncle living, nor a child of a deceased phew with a living nephew, nor a grandchild of a deased brother of the intestate with a child of a deceased other of the intestate The next of kin are to be invesrated by the same rules of consanguinity as prevailed. before explained (a), according to the computation of e civilians, and not of the canonists, which the law of Igland adopts in the descent of real estates; because in e civil computation, the intestate himself is the terminus, quo the several degrees are numbered, and not the comon ancestor, according to the rule of the canonists: d therefore, the mother, as well as the father, succeeded all the personal effects of their children, who died instate and without wife or issue, in exclusion of the broers and sisters of the deceased. And so the law still mains with respect to the father; but by Statute Jac. 2 c. 17, if the father be dead, and any of the chilen die intestate without wife or issue, in the lifetime the mother, she and each of the remaining children their representatives, divide his effects in equal porus to each. When the father takes, he takes all to e exclusion of the mother. If there be no parents or ildren, or descendants of children, and the nearest surving relations are brothers and sisters, and grandfather d grandmother, the two former will take, though all 8 in the second, and therefore equal degree. ther or grandmother will exclude uncles and aunts, the tter being in the third degree: which is the reverse of e present law as to realty. Great grandfathers and eat grandmothers share with uncles and aunts, all being A grandfather on the father's side and equal degree.

<sup>(</sup>a) pp. 117, 134.

grandmother on the mother's side share equally, dignity of blood not being material. Aunts and nieces, uncles and nephews, being all in the third degree, are equally entitled. Relationship by marriage gives no title, except in case of the wife of the intestate. Relations by the half-blood take equally with those of the whole blood in the same degree.

Con. Stat. 73, as to separate property of married women.

The above is subject to an exception as regards the separate personal property of a married woman, under Con. Stat. ch. 73, by s. 17 of which, such property, on death of the married woman intestate, leaving a husband and children, will go as to one-third to the husband, and the residue to the children; and if there be no children, then it will go as if the Act had not been passed, and so the husband could acquire the whole as entitled to administration.

Comparison of descent of realty and of succession to personalty.

It will have been seen, as pointed out, in considering the various sections of the Statute of Victoria, that the whole course of descent does not differ widely from the rules of succession to personalty under the Statute of Distributions: that the former as well as the latter are based on the civil law, and the claimants take much in the same order and computation of degrees; where claimants do not take under the Statute of Distributions equally with those in the same degree, the same exceptions exist under the law as to realty. mother, and children of an intestate are in the same degree of consanguinity to him, viz., the first degree; but an exception to the rule that all in equal degrees share equally, exists both as to personalty and realty in favor of the children, who take priority, without any distinction as to the half-blood, (unless in case of real estate come from a lineal ancestor, section 36); and in each case they and their descendants take per stirpes or per capita, sccording to whether they are all in equal or unequal degrees; a system quite unknown to the common law. Again, failing the father and descendants; the mother being the only remaining person in the first degree, would

e taken all, but by the Statute of James (there being vidow), she is to take an equal share absolutely with thers and sisters of the intestate, and their children: the Statute of Victoria proceeds on the same principle, gives the realty to the mother for life, and the remainto brothers and sisters, and their descendants. e in the second degree, viz., grandfathers, grandmos brothers and sisters, the same rule and the same eption to it exists as above alluded to; they are all in al degrees, and yet the brothers and sisters take priv. So again, neither as to personalty or realty will or more surviving brothers or sisters, as nearest in ree, exclude the children of a deceased brother or sister. more remote in consanguinity—no distinction is made reason of age, sex, or blood, (unless, indeed, as to the er in case of an ancestral estate); and the peculiar de of taking, sometimes per stirpes and sometimes per nita, pervades both systems, and applies in like cases: re is also the same law of hotch-pot with but trifling The rights as to realty of the widow or husid of an intestate cause no great variance, at least in aciple: they take interests in the realty under the same sumstances that they would in personalty, though the ue of the interest may differ. Thus, the widow by exss reservation of her right in the Statute of Victoria. es her dower or one-third for life in realty; and in sonalty she takes the same proportion absolutely if re are lineal descendants, and if none then one-half ab-Itely: so the husband may take under similar reservaas tenant by the curtesy (issue being born who might erit), the whole of the realty for life; whilst, as to sonalty, the separate property of the wife, he will un-Con. Stat. ch. 73 receive one-third absolutely and the idue will go to the children in the same manner as peralty of a husband would be distributed between widow children, and if no children he will take all absolutely. The variance seems chiefly to consist in this: that the Variance, tute of Victoria, when the inheritance is derived by the

Variance.

intestate from a relative, gives preference in certain instance to the blood of such relative, as may be exemplified by its excluding the half-blood, (if the estate have been derived from an ancestor), and postponing the uncles and aunts, (if derived from a relative), on the side on which the inheritance is not derived; and in giving also the father only a life-estate, if the property came on the maternal side, where he would otherwise take the fee: whilst as to personalty no regard is paid as to the derivation of the property. Again, grandfathers and grandmothers are excluded as to realty, unless they can take under s. 27; whilst as to personalty, they are only postponed to those in the same degree, viz., brothers and sisters, and share in the same class with those of the third degree, viz., uncles and aunts: furthermore, as to realty, the right of representation is extended to descendants of collaterals, as of brothers and sisters, uncles and aunts; whilst as to personalty, it extends only to children of one class of collaterals, viz. of the brothers and sisters of the intestate.

sometimes a life estate in tv. when in similar circumstances as to personalty. on absolutely.

It will be seen that sometimes the Statute of Victoria the whole give gives a life estate in the whole and remainder over; whilst en as to real- the Statutes of Distributions in like circumstances give only a proportion or share of the whole, but absolutely: the principle still is the same; the same parties take, and are a share is giv- perhaps equally benefited, though in a different mode, for the absolute right to a proportion may be worth neither more nor less than a life estate in the whole. The Statute of Distribution, dealing only with personalty, could give no life-estates, such a dealing with personalty would be foreign to its nature, and the laws which govern it (a), whereas no such difficulties present themselves in giving a life-estate in realty; and such a course has the advantage over giving a share absolutely, that the estate is ultimately preserved more entire. The 28th section affords an illustration of this; it gives the mother an estate for life in all, whilst the Statute of James gives her, in like circum-

<sup>(</sup>a) See Wms. Pers. Prop. as to the rights and remedies in equity of one entitled in remainder after a life interest given in chattels.

nces, (and there being no widow), a moiety absolutely personalty, the other moiety going to brothers and sisters the intestate

The Descent of Estates Tail is unaffected by the Statutes Estates tail. William and Victoria, and is of a peculiar character, for it is regulated per formam doni and the statute de donis ulitionalibus, and as descent has to be traced to the first rchaser, or donee in tail, the common law maxim seising it stipitem does not apply (a), nor consequently is there exclusion of the half-blood, for the issue in tail are 'avs of the whole blood of the donee (b). Other comn law rules still govern, and therefore primogeniture, and preference of males to females still prevails in the case an estate tail general, as to a man and the heirs of the v. When however the limitation is to a man and the rs male, or heirs female of his body, the descent can only traced to and through heirs male in the first case, and rs female in the other; so that on a gift in tail male, if donee die leaving two sons, and the eldest enter and leaving a daughter, the second son, or the heirs male his body, will next take.

t will have been observed how the principles of the Comparison dal system governed the common law rules of descent. Various periwas from the person last actually seised, and so ready ods of descent. present at the call of his lord to render the feudal seres, and not from the person last entitled merely, that cent was to be traced. Again, the lineal ancestor er took; a rule founded probably on the feudal princithat the ancestor would be unfit for the military seron the condition of which the estate was granted: it only by a fiction of law that collateral ancestors were wed to take. So also the strict feudal rule, which reed the collateral heir to be of whole blood of the purser, excluded entirely the collateral kinsman of the halfd as heir to the person last seised. Again, attainder so

<sup>(</sup>a) 3 Rep. 41b.

<sup>(</sup>b) 8 T. R. 213.

far corrupted the blood, that descent could not be from or through the person attainted: nor was th haps, unnecesarily harsh, in the troubled times middle ages, when fealty and allegiance were all-im In course of time however, the necessity of many rules founded on the feudal system had ceased to and such rules were not only unnecessarily har unjust, but unsuited to modern times; hence the effected by the Statute of William. The implied tion, dum bene se gesserit, on grant to the vassal. longer the importance it had in feudal times; and corruption of blood consequent on attainder was ab-The importance which the common law attached to possession had passed away, and hence the more ju was introduced, of not excluding, as the stock of a the person last entitled, merely because he did not : actual seisin: and the mere fact of his being the last entitled, was sufficient to enable descent to be from him as a stirpes, unless indeed he inherited. service had ceased to exist as the condition of tenur estate, and with it consequently was abolished th excluding the lineal ancestor. So again, on princi natural justice and equity, the half-blood were not ded, and the land not escheated rather than the hal should take, as not being of the blood of the pur but such half-blood were favorably admitted to the tance.

While changes however were effected by the Sta William, it will be seen that they were by no me radical as those effected by the Statute of Victoria: most of the common law rules still continued. The law of primogeniture continued among males; the ence also of males to females; the law of coparcenar representation by lineal descendants ad infinitum ancestor, or descent per stirpes; and the preference certain extent, given to the blood of the first pur since, if the person last entitled inherited, though fi mother (the purchaser), the heir would be sought

dure of lineal descendants among the maternal in prerence to the paternal line of the person so last entitled. During the third period, governed by the Statute of ictoria, from the 1st January, 1852, an entirely different stem will be found to prevail: a system based on the vil. instead of the feudal law. Every trace of the latter ases to exist (except a partial relic of the preference iven to the blood of the purchaser in cases of the halflood, and uncles and aunts), and lands, as regards their excent, are placed on somewhat the same footing as chatk: primogeniture is abolished: females take equally with ales in the same degree: descent per capita prevails in replace of descent per stirpes; the half-blood are admitad equally with the whole blood in the same degree (unless case of an ancestral estate, and the half-blood not being f the blood of the ancestor); and, as though the more fully sweep away the former law, the Statute of Distributions re to govern in cases not specifically provided for. sistence of each particular system during the three epochs nto which the subject has been divided, may be referred o the requirements of the country and of the age in which ach system existed or exists, though perhaps in that respect both the Statutes of William and Victoria might have been passed at earlier periods.

# CON. STAT. CH. 84.

# An Act respecting Dower.

#### WIDOWS TO BE ENTITLED TO DOWER IN CERTAIN CASES.

Dower out of equitable estates.

1. When a husband dies beneficially entitled to any land an interest which does not entitle his widow to dower out of same at law, and such interest whether wholly equitable or par legal and partly equitable, is an estate of inheritance in possession equal to an estate of inheritance in possession, (other than estate in joint tenancy), then his widow shall be entitled in equal to dower out of the same land. 4 W. 4, c. 1, ss. 13, 14, 15.

Dower where husband had a right of entry. 2. When a husband hath been entitled to a right of entry action in any land, and his widow would be entitled to dower of the same if he had recovered possession thereof, she shall entitled to dower out of the same, although her husband did recover possession thereof; but such dower shall be sued for obtained within the period during which such right of entry action might be enforced. 4 W. 4, c. 1, s. 14.

### DOWER ABOLISHED IN CERTAIN CASES.

Certain dower 3. No widow shall be entitled to dower ad ostium ecclesia abolished. dower ex assensu patris. 4 W. 4, c. 1, s. 15.

# HOW DOWER MAY BE BARRED.

Dower may be barred by joint deed of husband and wife.

4. A married woman may bar her dower in any lands or her taments in Upper Canada, by joining with her husband in a cor conveyance thereof in which a release of dower is contain 2 V. c. 6, s. 3.

When may be barred by separate deed of wife.

- 5. A married woman may also bar her dower in any land hereditaments by executing either or alone, or jointly with o persons, a deed or conveyance to which her husband is not a percontaining a release of such dower. 37 Geo. 3, c, 7, s. 1.
- When wife to
  be examined
  as to her consent.

  6. A married woman barring her dower by a deed or con
  ance to which her husband is not a party, shall be examined
  one of the Judges of the Courts of Queen's Bench or Com
  Pleas in Upper Canada, or the Judge of the Courty Court



or presiding Magistrate of the Court of Quarter Sestwo Justices of the Peace for the County in which she happens to be, touching her consent to be barred of 37 Geo. 3, c. 7, s. 1; 3 W. 4, c. 9, s. 1; 2 V. c. 6, . 3, c. 10, s. 1.

uch married woman upon being so examined gives such Certificate of nd the same appears to the Judge, Chairman or pre-consent. gistrate, or Justices examining her to be voluntary and ect of coercion on the part of her husband or of any other 1ch Judge, Chairman, or presiding Justice or Justices fy on the back of the deed to the following effect: 37 7, 8, 2,

B. and C. D., of the County of . in the Form. of Canada, Esquires, two of her Majesty's Justices of , in and for the said County, or, I ta Judge, &c., as the be), do certify that E. F., wife of G. F., personally apfore us (or me, as the case may be), and being duly exr us (or me), touching her consent to be barred of her lower of and in the lands in the within deed mentioned, ear to us (or me) that the said E. F. did give her coneto freely and voluntarily without coercion or fear of n the part of her husband or of any other person.

Signed,

3 W. 4, c. 9, s. 1.

arried woman being within the United Kingdom of Who to certify tain and Ireland, or any of Her Majesty's Colonies, or out of Upper d States of America, and there barring her dower by or conveyance to which her husband is not a party, shall ed as mentioned in the sixth section of this Act, by the · Chief Magistrate of a City or Town if in the United or if in a Colony or in one of the United States, by a the Supreme Court of the Colony or State, and if she consent and the same appears to the person so examinfree and voluntary and not the effect of any coercion id; such person shall certify on the back of the deed to prescribed by the seventh section of this Act. 7, s. 1,

certificate under the last section of this Act, shall, if Certificate. y a Mayor or Chief Magistrate, be under the common how verified. e City or Town over which such Mayor of Chief Magis-

trate presides, or under the seal of office of such Mayor or Chief Magistrate, and if granted by a Judge, such certificate shall be verified by the seal of the person administering the government of the Colony or State of which the person certifying is a Judge-48 G. 3, c. 7, ss. 2, 3,

Unless the husband is a party, dower not barred without acknowledg. ment

10. No deed or conveyance of a married woman to which her husband is not a party, shall be effectual to bar her dower unless the directions contained in the sixth, seventh, eighth and nine sections of this Act. (as the case may be), are complied with. 3 Geo. 3, c. 7, s 1.

Fee for certificate

11. A fee of one dollar may be demanded for any certifica under this Act. 50 Geo. 3, c. 10, s. 2-3 W. 4, c. 9, s. 2.

It will be necessary for the consideration of the aboveand of other sections and statutes relating to dower. take a short comprehensive view of the subject. It ma ---y be considered under the following heads:—1. Who may be 2. Of what the widow may be endowed at Law 3. Of what in Equity. 4. How dower may be barred andefeated, and the right thereto conveyed. 5. The mode o endowment, and damages for detention.

# 1. WHO MAY BE ENDOWED.

Who may be endowed. Marriage, eviand validity.

She must be the actual wife (a): the rule as to proo whereof varies here from the practice in England; as here dence thereof, evidence of co-habitation, and reputation of marriage wil suffice, subject to the presumption arising therefrom being rebutted. (b).

As to the validity of the marriage.

"The rule that a marriage which is good in the country where it is celebrated is good everywhere (c), is subject to

<sup>(</sup>a) As to marriage, the Acts relating thereto, evidence, &c., see Draper on Dower, ch. 2; the Acts there referred to and commented. on are: 33 Geo. 3, c. 5; 39 Geo. 3, c. 4; 59 Geo. 3, c. 15; 11 Geo. 4, c. 36; 20 Vic. c. 66; Con. Stat. c. 72; Imp. Stat. 5 & 6 Vic. c. 26, and the Statutes of Henry. See also Hodgins v. McNeil, 9 Grant 305; The Queen v. Roblin, 21 Q. B. U. C. 352; Regina v. Chadwick, 11 Q-B. 238.

<sup>(</sup>b) Graham et ux. v. Law, 6 C. P. U. C. 310; Beatty v. Beatty, 17 C. P. U. C. 484.

<sup>(</sup>c) See as to marriage by a Christian British subject with a Cree squaw, in 1803, in the Hudson Bay Territory, and cohabitation as man and wife, Conolly v. Woolrich, Lower Ca.s. Jurist, Vol. 11, p. 197. also, as to marriages entitled to the privileges of necessity, Ruding v -

rualification that the marriage must not be one proed by the country to which the parties belong; and efore a marriage in the United States between parties iciled in Canada, who cannot contract marriage here. ld be held void and illegal in our Courts" (a). The nction must be borne in mind between void and voidmarriages: in the latter case, "after the death of er of the parties, the temporal courts, which have no diction themselves, and must regard every marriage wto, as good, until it is declared void by the ecclesial courts, will not permit them to declare the marriage after the death of one of the parties, when their ence can have no effect on the marriage itself, it being dy dissolved by death, and its only effect will be to ardize the issue. The result is, that after the death of parties, the marriage is valid and the issue legitimate acto but not de jure" (b). Thus a marriage with a ased wife's sister cannot be questioned after the death ther party to it, and the widow is entitled to dower (c). ne Imperial Act 5 & 6 Wm. 4, ch. 54, does not apply to make such a marriage void, and there is no tribucompetent to dissolve it. "It cannot be said that any siastical tribunal or jurisdiction is required in any ny or settlement where there is no established Church, in case of a settled colony, the ecclesiastical law of land cannot, for the same reason, be treated as part of law which the settlers carried with them from the her country" (d). The Legislature can grant a divorce, they have established no Court having such power. English canon law, it has been said, (e) "so far as it part of the law of England, had been introduced by the

<sup>&</sup>lt;sup>1</sup>, 2 Hagg. Con. Rep. 371, and as to polygamous marriages, Law Ct. Pro. and Div. Vol. 1, p. 130, Hyde v. Woodmansee.

Draper on Dower, p. 13; Brook v. Brook, 7 Jur. N. S. 422; ins v. McNeil, 9 Grant, 305, per Esten, V. C.

Hodgins v. McNeil, supra, per Esten, V. C.

Hodgins v. McNeil, supra.

Re the Bishop of Natal, 11 Jur. N. S. 358, per Ld. Chan.

Per Esten, V. C., in Hodgins v. McNeil, supra.

Constitutional Act." (32 Geo. 3, ch. 1), and that the Provincial Act, 33 Geo. 3, ch. 4, "presupposes the ecclesiastics law in force." In Regina v. Roblin it was considered the the Constitutional Act introduced the English Commo and Statute Law relating to marriage, including the Geo. 2, ch. 33, unless perhaps section 11, and with the exce tion of such laws as were not applicable to the condition the colony (a).

On a divorce a vinculo making the marriage void = inito, there will be no dower, but on a divorce a mensa thoro, dower will be allowed (b).

Forfeiture by adultery and elopement.

By the Statute of West. 2, if the wife commits adulteand clopes she forfeits her dower, unless the husband co done the offence. The leaving and separation must be tvoluntary act of the wife: for where the husband aba doned the wife, and she afterwards lived in adultery, tr was held to be no bar to her dower (c). On the other ham if the wife leave by reason of her husband's cruelty, an live in adultery, she forfeits her dower, for the excuse only applies to the leaving (d).

As to the right of alien widows and wi-

At common law the widow of an alien, and an alien widow were not entitled to dower (e); but by special Act, dows of aliens. 8 H. 5, (not printed), alien women married thereafter to Englishmen with the King's license, are endowable (f). And it would seem that under certain circumstances a quasi estoppel would arise which would prevent the ples of alienage of the husband from being a defence. where the widow of an alien who had conveyed to the tenant, sued for dower, and the defence was the alienage of the husband, Draper, C. J., in giving judgment for the demandant said, (g) "the only title the tenant has was derived

<sup>(</sup>a) See also per Esten, V. C., in Hodgins v. NcNeil.

<sup>(</sup>c) Graham v. Law, 6 C. P. U. C. 310. (b) Co. Litt., 32a.

<sup>(</sup>d) Woodward v. Dowse, 10 C. B. N. S. 722.

<sup>(</sup>e) As to alienage, and the statutes and cases relating thereto, Leith's Blackstone, 181, 190.

<sup>(</sup>f) Co. Litt. 31b, and note 187, ib.

<sup>(</sup>g) Davenport v. Davenport, 7 C. P. U. C. 401; see also Irwin McBride, 23 Q. B. U. C. 570, per Draper, C. J.

# WHO MAY BE ENDOWED

demandant's husband; on the principle of the two erred to, and especially the latter, there is no doubt ind the defence fails." In the case referred to (a) tee of an alien was allowed to recover in ejectinst the grantor of the alien who had remained in

lon. Stat. of Canada ch. 8. sec. 9 is as follows:-

Alien shall have the same capacity to take, hold, possess, Con St. c. S. s. im, recover, convey, devise, impart and transmit real 9, enabling im, recover, convey, devise, impart and transmit real aliens to take all parts of this Province, as natural-born or naturalized and transmit. of Her Majesty, in the same parts thereof respectively. ed always, that nothing herein contained shall alter, Proviso.. affect, or be construed to alter, impair or affect, in any r way whatsoever, any right or title legally vested in ed by any person or persons whomsoever before the aird day of November, 1849. 12 V. c. 197, s. 12.

Vic. ch. 16, aliens can take and transmit by descent, 29 Vic. c. 16, Act is to be read retrospectively as part of the Act enabling aliand has a similar proviso as to vested rights.

transmit by

### F WHAT THE WIDOW MAY BE ENDOWED AT LAW.

title a widow to dower at law (as distinct from Requisites. t in equity, which is presently explained), the hat she is entitled to be endowed of all lands and ts of which her husband was seised in fee simple il at any time during the coverture, and of which e which she might have had might by possibility in heirs; the seisin must have been a several seiof an estate of inheritance in possession (b); eisin in law would suffice, as also by Stat. 4. Wm. right of entry or action to such estate.

l be observed that there is no necessity that isild actually be born, as is requisite in tenancy curtesy, but the possibility suffices.

must, to entitle the widow to dower at law have Seisin.

e d. McDonald v. Cleveland, 6 Q. B. U. C. O. S. 117, Macau-

<sup>18.</sup> Rl. Prop. 8th ed., 224; Watkins Conv. 9th ed., 89.

Seisin.

Con. Stat. c. 84, s. 2.

been seisin in the husband during coverture, and that of an estate of inheritance in possession; this branch of the rule is, however, subject to an exception, created by 4 Wm. 4., ch. 1, Con. Stat. ch. 84, sec. 2 (a), by force of which, if the husband were disseised before coverture and so continued during coverture till death, the widow would yet be entitled to dower, but it must be sued for and obtained within the same period, that the husband's right of entry might be enforced. But if the husband were once seised during coverture, his subsequent disseisin and bar by the Statute of Limitations would not operate against his widow (b).

It is the necessity for seisin in the husband which excludes

Dower out of a remainder. the widow at law from dower in trust estates of the husband, of which the legal seisin is in the trustee. So also, dower does not attach on a remainder in fee dependant on a life-estate, if the remainder-man die or alien pending the life-estate (c); for the seisin of the freehold is in the tenant for life, and the remainder also is not an estate of inheritance in possession: but if a remainder or reversion be dependant only on a term of years, as the possession of the tenant is the possession and constitutes the seisin of the remainder-man or reversioner, dower will attach; and this is so also with regard to tenant by the cursesy. It was by force of that part of the rule now under

Old form of conveyance to uses to bar dower.

shortly stated was this; to the purchaser for life, with remainder on determination of that estate by surrender or otherwise, to a trustee and his heirs during the purchaser's life, with remainder to the heirs and assigns of the purchaser in fee (d). It will be seen under this form of conveyance that, though quoud the life estate the purchaser is sei-

consideration that the widow was excluded from dower

under one form of conveyance to uses to bar dower, in

vogue before the statute last referred to: which form

sed in possession, yet that estate is not of inheritance,



<sup>(</sup>a) Ante p. 212. (b) McDonald v. McMillan, 23 Q. B. U. C. 39 2 (c) Cumming v. Alguire, 12 Q. B. U. C. 330; Pulker et. al. v. Evaluation 13 Q. B. U. C. 546. (d) More fully explained post p. 232;

h (by force of the rule in Shelley's case) he is ento the remainder, which is an estate of inheritance, is not an estate of inheritance in possession. he estate be subject to a term of years granted before Lease outure by way of mortgage, the widow of the mortgagor entitled to dower at law, with a cesset executio; the term (a), and in equity be entitled to redeem if inks fit (b). If the lease be absolute, the widow will titled to a third of the rent immediately, and also of the land with a cesset executio during the c).

eisin in law of the husband will be as effectual as a seisin in law in deed, in order to render the wife dowable; for it suffices, in the wife's power to bring the husband's title to an seisin, as it is in the husband's power to do with rethe wife's lands; which is one reason why he shall tenant by the curtesy but of such lands whereof the result he himself in her right, was actually seised in

seisin of the husband for a transitory instant but not a tranthen the same act which gives him the estate cont out of him again, will not entitle the wife to : for the land was merely in transitu, and never Thus, the widow of a grantee in as of grantee in the husband. uses, in whom the use is immediately executed into to uses, sion by the Statute of Uses, in the cestui qui use, is titled to dower; as if A grants to B and his heirs to e of C and his heirs, here the widow of B shall not lower, for the seisin of B was but transitory, the Secus, if the onveyance which gave him the estate also immedi-seisin rested at all in the ook it from him by declaring a use on which the husband, e of Uses would operate (d). But if the land abides husband for the interval of but a single moment, the vall be endowed thereof (e): as where a vendor exe-

hisholm v. Tiffany, 11 Q B. U. C. 338.

s to redemption by a widow see post p. 223. (c) Prec. Ch. 250. er Esten, V. C., Norton v. Smith, in Appeal, 7 U. C. L. J. 263, o. Eliz. 503; 2 Black. Com. 132,

ance and reconveyance by way of mortgage.

The widow entitled, but chargeable as to her allotment, with one-third of

as on convey- cuted a deed of conveyance to a purchaser in fee, who immediately after such execution, re-conveyed the lands to the vendor by way of mortgage, to secure the unpaid purchase money, it was held the widow of the purchaser was entitled to dower (a). But in such a case the dower allotted will be chargeable with a third of the interest of the mortgage, unless the dowress will pay a third of the mortgage debt; and the acquisition of the equity of redemption by the the mortgage. owner of the legal estate, or mortgagee, will not cause a merger so as to preclude him as against the dowress from insisting that the mortgage is on foot and unsatisfied (b).

> When the parties desire quoad the purchase money, to be placed in the relative positions of mortgagor and mortgage, and the wife of the purchaser declines to bar dower, the lands may be conveyed by common law conveyance or by grant, to some third person, to the use of the purchaser and his heirs till default in payment of the purchase money, and on default to the use of the vendor in fee: here on the happening of the event, viz., default, the use limited to the vendor will arise and the fee pass to him, and the wife of the purchaser not be entitled to dower: for the estate is limited to the purchaser, not simply in fee, but as a conditional limitation, restricted and liable to be defeated by the very terms of the conveyance (c). As to dower in regard to mines and the like, see Bowles's case, Tud. Lg. Ca. 2 ed. 69; Stoughton v. Leigh, 1 Taunt, 410; Rex v. Miller, Cowp. 619: Dicken v. Hamer, 1 Drew. & Sm. 284.

Not of partnership property.

A widow will be restrained in equity from claiming dower out of real estate purchased with partnership property in the name of her husband, or in the joint names of him and his co-partners, for the purpose of partnership in

<sup>(</sup>a) Potts v. Meyers, 14 Q. B. U. C. 499; Norton v. Smith, 20 Q. B-U. C. 213; s. c. in appeal, 7 U. C. L. J. 263.

<sup>(</sup>b) Hency v. Low, 9 Grant, 265; see, however, the judgment Esten, V. C. as to the necessity of some evidence of express intention the owner of the legal estate to keep alive the mortgage by assignment a trustee or otherwise; see also as to dower on merger, Bowles's Tud. Lg. Ca. p. 58, 2 ed.

<sup>(</sup>c) Watkins' Conv. 9 ed., p. 103 and note,

e(a); for such property is considered in equity as perlestate, and therefore not liable to dower, and morethe husband is trustee for the partnership: ice also can be raised by equitable plea at law (b). So Nor in case of if the husband before marriage had contracted to sell sell before anted a right of purchase of, his real estate: here, if marriage. contract or right were still subsisting on the husband's h the widow as against the party entitled to claim the fit thereof, would be equally restrained in equity (c). iese cases, as also in the case of the widow of a trus- if husband. or of a mortgagee when the equity of redemption is for- trustee or 1 at law but is subsisting in equity (in which case the gagee is still in equity considered as trustee for the gagor.) the widow, it has been said by high authority before the days of equitable pleas at law, is in strictat law entitled to dower; for there was in the husband at was required to entitle his widow to dower asng him to have been seised in fee; but as remarked e case on the point. "if the wife of a trustee or mortwere to be so ill-advised as to prosecute her legal equity would undoubtedly saddle her with all the and restrain the action at law." Now the defence be set up by equitable plea.

e widow of a mortgagee will not be entitled to dower. e the estate of the mortgagee never becomes absolute. s defeated by performance of the condition (e). When rtgage has become absolute, and the equity of redempis extinct at the time of the claim made for dower, by of time and other circumstances, still if that state of rs did not exist at the death of the husband (the morte), and the equity of redemption was then still subig, his widow will not be entitled to dower (f).

Phillips v. Phillips, 1 My. & K. 649; Conger v. Platt, 25 Q. B. 277: see also generally as to partnership property, 1 White & 3. Ca. 3 ed. 160; Bisset on Partnership, p. 50. See form of plea Conger v. Platt, supra.

<sup>\*</sup>arke on Dower, 106 note o.; see post, p. 225.

Sur. Vend., ch. 12. s. 1; Lewin on Trusts, 5 ed. 299; Park on 100. (e) Ham v. Ham, 14 Q. B. U. C. 497.

Flack v. Longmate, 8 Bea. 420.

The right of the widow of a mortgagor is considered in treating of dower in equity.

Sole seisin.

The seisin must have been a sole seisin; therefore the widow of a joint tenant is not, though the widow of atenant in common is, entitled to dower (a).

Exchange.

In case of exchange of lands, the widow is not entitled to dower in the land both taken and given in exchange: she is in such case put to her election as to the lands out of which she will be endowed (b).

Where dower is allowable, it matters not though the husband aliene or incumber the lands during the coverture; for he alienes them liable to dower.

The right in 3. Dower in equity, arising by virtue of the Con. equity by Con.

Stat. 84.

Stat., c. 84, s. 1 (c).

No dower at Com. law out of trust estates.

Husband must die entitled.

Instance of estate partly legal and partly equitable which qualifies.

Prior to the statute a widow was not entitled to dower out of trust estates of her husband, though they might have been equitable estates of inheritance in possession: this varied from the law as to curtesy which gave the husband a life interest in such estates of the wife, the other requisites to qualify the husband being present. It will be observed, the husband must die beneficially entitled, therefore if the husband alien there will be no dower. The old form as above given of limitations to uses to bar dower (hereafter explained (d), and now rendered inoperative by this Act), affords an instance of that interest named in the statute as partly legal and partly equitable equal to an estate of inheritance in possession; the first life-estate to the purchaser and his remainder in fee being legal estates, and the intervening estate to a trustee for him being an equitable estate, and the three together equal to an estate of inheritance in possession-

<sup>(</sup>a) Haskill v. Fraser, 12 C. P. U. C. 383; Ham v. Ham, 14 Q.B. U. C. 497.

<sup>(</sup>b) Co. Litt. 31 b; McLellan v. Meggatt, 7 Q. B. U. C. 554; salso Towsley v. Smith, 12 Q. B. U. C. 555; Stafford v. Trueman, 7 C.P. U. C. 41, as to the proof required that the transaction was an exchange.

<sup>(</sup>c) See the statute ante p. 212. (d) Post. p. 232.

widow will be entitled to dower when the husband has Dower of an eyed in fee by way of mortgage before coverture, and equity of redemption. entitled to the equity of redemption; that is, she may demption, claim dower. If the estate be subject to a of years granted by way of mortgage before coverthe widow of the mortgagor will be entitled to judgat law for her dower, with, however, a cesset executio ng the term (a), and she may redeem if she think fit. e mortgage be after coverture and the wife join to lower, and the husband die entitled to the equity of notion, the widow will be entitled to redeem and 1 dower; and in such case if she pay the whole mortshe will be entitled to the whole estate till she shall been reimbursed the whole redemption money, less so h thereof as shall be proportionate to her dower (b). re the husband during coverture, made three conveys in fee by way of mortgage, in only the last of which uring £111) the wife joined to bar dower, it was held bill to foreclose after the death of the husband by a stiff as holder of all the mortgages, that the widow was tled to redeem all, and hold the whole estate till she ild be reimbursed the redemption moneys, less so much ne £111 as should be proportionate to her dower; or e preferred to be let into her dower on payment of the l only, and if the prior mortgages should be afterwards sfied, to be entitled to a conveyance of the whole estate old till she should be reimbursed the £111, less so much eof as should be proportionate to her dower (c). very recent case the widow had joined in a mortgage bar dower; the estate was sold under decree in an inistration suit, and after deducting the mortgage debt re was an available surplus of less than a third of the realized and value of the land; it was held that the ow was entitled to have the whole surplus set apart invested for her dower, as being entitled to have the

Chisholm v. Tiffany, 11 Q. B. U. C. 338.

Thibodo v. Collar, 1 Grant 147; Saunderson v. Caston, 1 Grant 349.

Thibodo v. Collar, supra

estate exonerated and mortgage paid off out of personal or even real estate, as against creditors, to let in dower, and not merely to a third of the surplus as representing the value of the equity of redemption; and the only assets being the surplus, the creditors were postponed to the widow during her life (a).

Right to redeem.

If the widow have barred her dower in a mortgage in fee and the husband convey his equity of redemption, or it be foreclosed, or sold under execution, she will not be extitled to redeem to let in dower, for the husband did not die beneficially entitled (b). On a bill for foreclosure against the mortgagor and his wife who joined to ber dower, the equity of redemption being reserved to the husband, the bill was dismissed as against the wife with costs as an unnecessary party (c). Nor can the widow redeem, having joined in a mortgage to bar dower, as against a purchaser under a power of sale contained in the mortgage; and if the husband mortgage (in fee) before coverture, though he die entitled to the equity of redemption, the widow will not be entitled to redeem as against a purchaser on a sale after the husband's death, under a power of sale in the mortgage (d). The right of a widow of a vendee who, on conveyance by the vendor, has re-conveved by way of mortgage to secure the purchase money, in which the widow did not bar dower, is before treated of (e), as also the right of the widow of a mortgagee.

On husband's contract to purchase.

Where a husband contracts to purchase in fee, and dies, the widow will be entitled to dower as against the heirs-at-law. (f); and even though the contract could not be enforced in law by reason of default in the purchaser in the terms of the contract, still, if it be a contract subsisting and capable of being enforced in equity, the widow will be entitled to dower, and in such cases even be entitled to call on the personal

(e) Ante p. 220.

Compulsion by widow of

<sup>(</sup>a) Sheppard v. Sheppard, 14 Grant 174.

<sup>(</sup>b) Moffatt v. Thomson, 3 Grant 111.

<sup>(</sup>c) Moffatt v. Thomson, supra.

<sup>(</sup>d) Smith v. Smith, 3 Grant 451.

<sup>(</sup>f) Craig v. Templeton, 8 Grant 483.

sentatives of the deceased husband to administer and its complehe purchase money and complete the contract. The case tion. justiand having contracted to purchase, and the widow entitled to dower in equity, proceeds on the principle Principle, in equity, what is agreed to be done is to be coned as done, the money considered as actually converted land, and the vendor from the time of the contract a ee for the purchaser, who is thenceforth deemed benely entitled: and by application of the same principle On same prine converse case, viz., that of a husband who before ciple, widow barred on coniage has contracted to sell, and married before pay- tract to sell, of the purchase money or conveyance, here though pove mentioned, the widow would at law be entitled wer, still equity will restrain an action at law at the nce of the purchaser; for by the contract the land in w is deemed as converted into money, and the vendor ee for the purchaser (a). So again, a widow may, on Entitled in principle above mentioned, be entitled in equity to equity to dowr out of what would be personal estate at law: thus, may be per-T certain circumstances, money vested in trustees with sonal estate at ess injunctions to lay out the same in the purchase of in fee simple or fee tail for the benefit of the husband his heirs, even though never so laid out during the and's lifetime, will nevertheless be looked on in equity tually converted into lands, and the delay of the trusin doing what they ought to have done shall not prejuthe widow (b). On the same principle, a husband So also husin equity, be entitled to curtesy out of personal estate band entitled to curtesy out W, as if money be stipulated to be laid out in lands of personalty. settled on a feme covert in fee or in tail, the husis entitled to curtesy, though no purchase be actually e in the lifetime of the wife; and he will be decreed interest of the money till a purchase can be found. when the investment can be made he will have a life e in the lands (c).

Lloyd v. Lloyd, 4 Dru & War, 370. Lewin on Trusts, 5th ed. p. 676. Lewin on Trusts, 5th ed. pp. 524, 676.

Liable for Waste.

Clearing wild lands?

Tenant in dower is liable for waste. It is by no means clear that the cutting of timber for the purpose of cultivating wild lands is waste, and as regards tenancy in dower, the question, since the late Act of 32 Vic., is of little importance, though in cases of tenancy by the curtesy and other life estates it is still important (a).

How far the here, as to clearing wild lands.

(a) It is manifest that in many cases, especially in respect to wild lands, English law of the interest of the life tenant might not only be a worthless, but even waste applies damnosa hareditas, unless he be allowed to cut the timber and clear the land, for the life tenant is bound to pay off the taxes, at least if under the same title he takes other profitable lands: Biscoe v. Van Bearle, 6 Grant, 438; Weller v. Burnham, 11 Q. B. U. C. 90; see also per Blake, C., in Chisholm v. Sheldon, 1 Grant, 318; Lawrence v. Judge, 2 Grant, 301. In one case the question was raised; it was an action by the remainder-man against the tenant for life for felling trees; the plea was that the trees were felled for the purpose of clearing the land, and improving and cultivating the same according to the custom of good husbandry, and of Upper Canada, and that thereby the land was enhanced in value; the main question was not decided, for the plea did not necessarily call for it, as it was bad in not setting out that the land in fact was cleared of the trees cut down, and it was consistent with the plea that the trees were left lying to encumber the land. On the one hand it may be urged that the rendering the property more valuable will not the less prevent the cutting timber from being waste according to the adjudged cases; thus, the converting one species of edifice into another, though it is improved in value, is waste. The principle however in such cases appears to be, that the tenant shall not as against the remainder-man or reversioner, impair the evidence of title by altering the character or nature of the estate, as in England at least, property is frequently conveyed by specific reference to and description of its character. It may as regards the question of ameliors tion, perhaps also be urged, that though looking only at the present, the reversioner or remainder-man may be benefited by bringing timbered lands into cultivation in case his estate should by death of the life tenant shortly fall into possession, still that is matter of speculation and might be otherwise, for the life tenant might well live twenty or fifty years, and there can be little doubt that in such case it would have been far better for those in remainder or reversion that the estate should come then into their hands as timbered lands and virgin soil, than as perhaps an exhausted farm; the fact also that we are entirely dependent of foreign supply for all fuel except wood might be urged. On the other hand, public policy and the interests of the country require the enconagement of agriculture, and acting on this, the cutting of timber on wil lands in order to bring them into cultivation, has, throughout the United States been held not to be waste: Washburn Rl. Prop., 2nd ed., 108 4 Kent Com. 76. In Bac. Ab. Waste, ch. 1, is this note—"Some that ploughing must be prohibited by covenant to pay so much an across for that absolute restraint from ploughing is void."

In Rob. & Harr. Dig., title Waste, referring to Taylor v. Taylor, E. 📧 1 Wm. 4, not reported, it is said: "An action on the case for waste me he brought under 6 Ed. 1, ch. 5, by him in remainder or reversion life or years; and where land was devised for life with a reservation. 4. How dower may be barred or defeated, or the

A widow may be barred of her dower not only by elopement, divorce, and other disabilities before mentioned, but also by detaining the title deeds or evidences of the estate Detinue of from the heir, until she restores them (a).

By the Statute of Gloucester (b), if a dowress aliens the Forfeiture by land assigned her for dower, she forfeits it ipso facto, and conveyance. the heir may recover it by action (c): by this must be understood the case of a dowress conveying by feoffment a greater estate than for her own life (d): such mode of conveyance prior to 14 & 15 Vic. ch. 7. Con. Stat. ch. 90, sec. 3.

the oak timber thereon, it was held that a power to dispose of other descriptions of timber was not thereby implied, and that the tenant for life was guilty of waste in disposing of such other timber:" but that this should be waste is quite consistent with the ground on which the plea in Weller v. Burnham, supra, was held bad, for a mere sale or cutting down of timber undoubtedly would be waste; it is when it is followed up by a dearance for cultivation that the doubt arises.

Admitting that the land is meliorated, it may well be said that prevents Admitting that the land is menorated, it may went be said that prevents the clearing of land being waste, which otherwise, prima facie, it might be. Thus it is said: "En tiel lieus ou per le custom del pais l'airer de pree est bon husbandry, et pur melioration del pree, la, l'airer de ceo n'est wast"—2 Roll. Ab. 814. pl. 5: and so in an action for ploughing up an ancient meadow, Simmons v. Norton, 7 Bing 640, where the plea was nut wast, and the defendant sought to give in evidence this presentation of the melioration of dence that it was according to good husbandry and for the melioration of the land, which was rejected as not being specially pleaded, Tindal, C. J., says,—"I do not say that that which is prima facte waste may not be altered in its character, if under particular circumstances it should appear to have been done for the melioration of the lands, but if that be 40, it must be expressly stated on the record." In England even the question as to whether the felling of certain kinds of trees be waste, depends sometimes on whether such trees be scant or not. Lord Coke says, Co. Litt. 53a.—"Oak, ash, and elm, these be timber trees in all places, . . . also, in countries [meaning places in England, Ep.]
where timber is scant, and beeches or the like are converted into building for the habitation of man, or the like, they are all accounted timber:" so that waste as to trees appears to be governed by circumstances: see also, Chisholm v. Sheldon, per Blake, C., 1 Grant, 318; Lawrence v. Judge, 2 Grant, 301. It must be borne in mind, there is in the case of a lease reserving rent an argument in favor of the tenant, which may not exist where the estate comes by act of law, for in the former case it may be implied perhaps, that the intention of the parties was that the lands might be cleared.

<sup>(4)</sup> Park on Dower, 295, 296: see also Draper on Dower, 86.

<sup>(</sup>b) 6 Ed. 1, c. 7. (c) 2 Black. Com, 136. (d) 2 Inst. 309.

would pass such greater estate by wrong, and the penal to was forfeiture of all estate.

Jointure and ante-nuntial settlement.

Definition.

Another method of barring dowers is by jointure, regulated by the Statute 27 Henry 8, ch. 10, or by antenuptial settlement in lieu of dower. A jointure, which strictly speaking means a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate limited to the wife only, is thus defined by Sir Edward Coke: "a competent livelihood of freehold for the wife, of lands and tenements, to take effect in profit or possession presently after the death of the husband, for the life of the wife at least." Before the Statute of Uses the greater part of the land of England was conveyed to uses, and the cestui qui use then stood in much the same position as a cestui qui trust after the Statute, and had but an equitable beneficial interest. Now though a husband had the use of lands in absolute fee simple, yet the wife was not entitled to any dower therein, he not being seised thereof; wherefore it became usual on marriage, to settle by express deed some special estate to the use of the husband and his wife for their lives, in joint tenancy or jointure, which settlement would be a provision for the wife in case she survived her husband. At length the Statute of Uses ordained that such as had the use of lands, should to all intents and purposes be reputed and taken to be absolutely seised and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the Stat. of Uses. same time to any special lands that might be settled in jointure, had not the same statute provided, that upon making such an estate in jointure to the wife before marriage, she shall be forever precluded from her dower. But then these four requisites must be punctually observed: 1. The jointure must take effect immediately on the 2. It must be for her own life st death of the husband. least, and not pur auter vie, or for any term of years, or other smaller estate. 3. It must be made to herself, and

A bar under

Requisites of iointure.

other in trust for her. 4. It must be made, though it I not in the deed be expressed to be (a) in satisfacof her whole dower, and not of any particular part of If the jointure be made to her after marriage. has her election after her husband's death, as in er ad ostium ecclesia, and may either accept it or se it, and betake herself to her dower at common law: she was not capable of consenting to it during cover-2. And if by fraud or accident, a jointure made before riage proves to be on a bad title, and the jointress is sted or turned out of possession, she shall then (by provisions of the same Statute) have her dower pro to at the common law (b).

more usual mode, in Ontario at least, of preventing Bar by anteit of dower in present or future acquired property, is ment. settlement or agreement before marriage, by which the ended wife accepts any provision in her favour which eclared to be in lieu of dower in such present or future be acquired property; and if the intended wife were It at the time of the agreement, the inadequacy, preca- Though inade-18ness, or failure of the provision for her will not pre-quate, or it ther being barred: on this point Lord St. Leonards thus expresses himself-" If the present were a jointure rating as a bar under the Statute of Uses, [above exined—ED.1 the case would have been governed by sec-17 of that Statute; but in equity the bar rests solely on For the bar is tract, and my opinion is that in this court, if a woman, good by the ng of age, accepts a particular something in satisfaction lower, she must take it with all its faults, and must look the contract alone: and cannot in case of eviction come inst one in possession of the lands on which otherwise 'dower might have attached; this has nothing to do th the performance of covenants or the like. . . . My clusion is, that the plaintiff has accepted in lieu of dower

a) Gilkison v. Elliott, 27 Q. B. U. C. 95. (b) 2 Black. Com. 138. c) Dyke v. Rendall, 2 DeGex. Mac. & Gor. 209; see also Earl of kingham v. Drury, 2 Eden 60; Corbet v. Corbet, 1 S. & S. 612; see b, Tud. Lg. Ca., 2 ed., p. 63, 64.

payment of money at least, and that she is also concluded by the acceptance of the bond, and that, though the bond was not satisfied, she has no right to resort to lands of her husband bought and sold during marriage." borne in mind however, that the above remarks were made in a case in which the widow was seeking to enforce her dower, not against the heir at law, or a devisee, or a volunteer, but against a purchaser for value, who on purchase was aware, and perhaps relied on the settlement and agreement of the wife to accept the husband's Still, however, it would appear bond in lieu of dower. on the whole that the acceptance by an adult woman before marriage of any provision in lieu of dower, will though it fail, bar her as a matter of contract as against the husband and those claiming under him.

Infants barred gal jointure. but not by ante nuptial agreement.

but bound in equity by good equitable jointure.

Infants may be barred at law by sufficient legal joinat law by let ure under the Statute of Henry 8, as above explained. If the jointure be competent it will be good though it be not of the value of the dower (a): and though at law an infant may not be bound by her ante-nuptial agreement to accept a provision in lieu of dower, still in equity a provision made for an infant on her marriage, at least if with the assent of her father or guardian, and in all respects as certain, secure, and substantially equivalent to a good legal jointure, would be sufficient as a good equitable jointure, to restrain her from enforcing her legal right to A mere precarious and uncertain provision, dower (b). however, which she might never enjoy, though it might bar an adult on her contract to accept it as above mentioned, would not bar in case of an infant (c): thus a settle-

<sup>(</sup>a) Earl of Buckingham v. Drury, 3 Bro. P. C., Toml. ed. 492; Drury v. Drury, 4 Bro. C. C. 506, note; Harvey et ux. v. Asbley et al-, 3 Atk. 607.

<sup>(</sup>b) See cases last note; Tuil. Lg. Ca., 2 ed., p. 63; see also Davidson Conv., vol. 3, 2 ed., p. 728 note a, where the law is fully discussed; Sagal. Statutes, 2 ed., 246; but see Fisher v. Jameson, 12 C. P. U. C. 601, in which case, however, the provision made was precarious, insecure, and failed; see also this case in Appeal, 2 Error & Appeal Reports, 242, and the case in Appeal, 2 Error & Appeal Reports, 242, and the case in Appeal Reports, 242, and 242, and 243, and 244, and 24 remarks of Esten. V. C.

<sup>(</sup>c) Carruthers v. Carruthers, 4 Bro. C. C. 500, 513; Smith v. Smith 5 Ves. 188; Fisher v. Jameson, supra.

t of an estate on an infant for life, after the death of intended husband and of some third person, will not bar as a good equitable jointure; for the third person ht survive not only the husband but the wife who ht therefore never take anything.

ture under the Statute of Henry 8, but is still substan- of parents? v equivalent to it, would bar an infant in equity, if e before marriage without assent of her father or dian, is not perhaps quite clear. In one case (a) it is : "A female infant is bound by the settlement made er marriage as to dower and thirds, not by force of agreement in the settlement, but by reason of the conof her parents and guardians and of the Statute of ry 8." Perhaps if the equitable jointure be in all ress adequate and tantamount to a good legal jointure; or instance, if it complied in all respects with what is ured under the Statute, except that it was an equitable te of freehold instead of a legal estate, the infant would arred, and be restrained in equity from prosecuting her n at law: and that in such a case equity would follow law: and that as the infant would be barred at law lout her assent or the assent of parents or guardians, lso she will be barred in equity, if the provision only d in being a good legal bar, because it was an equitestate (b). It may well be contended that the assent arents and guardians is not requisite for the protection he infant, as the statute is a sufficient protection; and

Thether a provision, which is not valid as a good legal But if made without assent ture under the Statute of Henry 8, but is still substan- of parents?

nadequate one valid.

the absence of such assent will not, on the one hand, ler an adequate equitable jointure invalid, and on the r hand, that the presence of such assent will not render

<sup>)</sup> Simson v. Jones, 2 Russ. & Myl. 377; Stamper v. Barker et al., add. 157.

<sup>)</sup> Drury v. Drury, supra, Harg. Co. Litt. 36 b, note 7: Williams v. ty, 3 Ves. 545; Corbet v. Corbet, 1 S. & S. 612; Sugden Statutes, ed. 246; Jamieson v. Fisher, 2 Err. & App. Repts. 242, per m, V. C.

Assent of parents not material, if jointure bad.

The acceptance before marriage by an infant of an insufficient equitable jointure, or of one which has failed, would not suffice in equity, to deprive her of her legal right to dower, though accepted with the assent of parents or guardians: in other words, the concurrence of parents or guardians will not give force to a settlement accepted by an infant, which would not have been binding on her without such occurrence (a); for "a competent livelihood" is required at law: an incompetent jointure, or one that turns out worthless, would not be a good legal bar, under the Statute of Henry 8, and the courts of equity proceed only by analogy to this, unless indeed they can proceed and bar as on a matter of contract, (as in the case of an adult as above mentioned), which ground is insufficient where it is an infant who contracts to her own disadvantage.

Former mode of conveyance so that dower never even attached.

A conveyance to a husband may be so drawn, as that he may reconvey without the dower of his wife attaching. A form of such conveyance once used, was by common law conveyance to convey to the purchaser (the husband) and his heirs to hold to such uses as he should appoint, and in default of and till appointment to the use of him and his assigns during his life, without impeachment of waste, and on the determination during the life of the purchaser of that estate, by forfeiture or otherwise, to the use of the dower trustee and his heirs, or executors and administrators during the life of the purchaser, in trust for him and his assigns, and after the determination of the estate limit ed to the trustee to the use of the heirs and assigns of the purchaser. Under such limitations the husband, by exercise of the power, had full control, and if he died without exercising it, dower never even attached, for the only estate of which the husband would be seised in possession, during his life, would be the life-estate; and the remainder in fee is prevented from becoming an estate of inheritance in posses-

<sup>(</sup>a) Simson v. Jones, 2 Russ. & My. 377, 365; Field v. Moore, 7 DeG. M. & G. 691, 706, 709; see Harvey et ux. v. Ashley et al., 3 Att. 687; Ainslie v. Medleycott, 9 Ves. 13; Earl of Buckingham v. Degg. 2 Eden 60; Corbet v. Corbet, 1 S. & S. 612; Fisher v. Jameson, 12. C. P. U. C. 601, and the text books referred to on prior page, note 5.

n by force of the rule in Shellev's case, and the law of rger, in consequence of the intervening estate to the Such limitations as the above will however, Now useless v no longer suffice, unless indeed the husband exercised by Con. Stat. power, for by Con. Stat. ch. 84, s. 1, "When a husband 3 beneficially entitled to any land for an interest which s not entitle his widow to dower out of the same at law. such interest whether wholly equitable, or partly legal partly equitable, is an estate of inheritance in posses-L or equal to an estate of inheritance in possession (other a an estate in joint tenancy), then his widow shall be tled in equity to dower out of the same lands." Under h limitations as the above, the estate, it will be observed. artly legal and partly equitable, equal to an estate of eritance in possession.

nother form sometimes adopted, and which can yet be Another form pted with effect, so far as to enable the husband to con- can yet be adopted under free of dower, was to convey to the purchaser in fee which right husband), to such uses as he should appoint, and in subject to be ult of and till appointment, to him in fee; (the limita-defeated. is were usually more complex than as above in fee, but implifies so to state them) (b). Under such limitations, ver does attach, subject to be divested, on exercise of the ver of appointment; for the husband, till exercise of the ver is seised of an estate of inheritance in possession; on execution of the power, the appointee (a purchaser n the husband), comes in as if named in the conveyance he husband (in consequence of the peculiar operation of h powers and appointments), and so paramount to the at of dower of the wife. The operation and effect of se conveyances is thus: A conveys by common law conance, or by grant, to B (the husband), in fee, to such uses be (B) shall by deed appoint, and in default of and till pointment, to him (B) in fee; B sells to C, and conveys appoints the estate to C in fee, reciting the power of

i) Watk. Conv. 9th ed. p. 91, and notes.

<sup>)</sup> As to the covenants for title, 1 Smith, Lg. Ca. 5th ed. p. 64. See of conveyances, Davidson's Conv. vol 2, 169-173.

appointment: the whole transaction is now to be though by the first conveyance, A had conveyed his heirs, to the use of C and his heirs; which we the Statute of Uses vest the legal estate and fee so paramount to the right of dower (a). Of cours without exercise of the power, then if the limitate the simple form put, the widow of B would be the dower, which was never divested (b).

Devise or bequest in lieu of dower.

The acceptance by a widow of what is given expressly in lieu of dower is a good bar to her

(a) That executions may thus be defeated—see infra, note (b) There are probably few points in the law of real pro have been the subject of more conflicting weighty authority the in the text. At one time it was supposed that inasmuch a limited in default, or till exercise of a power, is a vested estat fore as dower did attach, that it could not be defeated by subs cise of the power. It seems however quite clear that it can be see Park on Dower, 186; Sugden on Powers, 8th ed. 194, 47 Ray v. Pung, 5 B. & Ald. 561; s. c. 5 Madd, 310; and as t and executions being thus defeated. Doe d. Wigan v. Jones, 459; Tunstall v. Trappes, 3 Sim. 300. It was however on a that the chief difficulty arose, viz., whether, where the estate is to some third person to uses, but directly to the purchaser stated in the text, so that he is in by the common law, any u in his favor or on his appointment are not void. It was said mon law seisin and a use or power cannot be co-existent in the in the same person; that the power would be merged in the f purchaser being in, and having the whole fee, as at comme further uses declared in his favor or on his appointment were: tory and void; that in order that any such uses should have a would be requisite to separate the seisin and the use, as by cc some third person to such uses as the purchaser should app appointment to the use of the purchaser. These views were st cated by men as eminent as Mr. Saunders and Mr. Preston: 8 on Uses, Vol. 1, p. 155; Preston Conveyancing, Vol 2, p. 4 pp. 265, 271, 494: see also the first part of the note to Watk ancing, 9th ed. p. 281; and Goodill v. Brigham, 1 B. & P. 192 stitutes a formidable array of authority against the doctrine on the other hand there is no less weighty and more modern its favour. Lord St. Leonards (Sugden) in his work on Power 93, reviews all the authorities, and comes to the conclusion tl under an appointment created as named in the text can well and of this opinion also is Mr. Coventry: see his note in bra first part of the note in Watkin's Conveyancing above refer also per Draper, C. J., in Lyster v. Kirkpatrick, 26 Q. B. U. (conveyancer may avoid all question by limiting the estate by a conveyance, or by grant under Con. Stat. ch. 90, to some this fee to such uses as the purchaser may appoint, and in default appointment to the use of the purchaser and his heirs. It is however that this precaution is quite unnecessary: see also Byrne, 8 Ir. C. L. Rep. 394. dower: so also if it can be clearly implied from the will that the provision was to be in lieu of dower; "it is not enough to say that on the whole will it is fairly to be inferred that the testator did not intend that his widow should have dower, in order to justify the Court in putting her to her election, it must be satisfied that there is a positive intention to exclude her from dower, either express or implied "(a). The mere gift of an annuity out of the estate will not render it compulsory on the widow to elect between it and her dower, she will be entitled to both.

Parol evidence of the intention of the testator to exclude dower is not admissible.

In order that the widow be barred by acceptance of the Acceptance of provision in lieu of dower, there must have been an opportion in lieu of dower, tunity to elect, and the acceptance must not have been in if made in ignorance of the provision being in lieu of dower (b).

It has been said that in order that the election to take no bar.

should be a defence at law, the intention that the provision Pleading elecshould be in lieu of dower must be expressed on the face tion to take. of the will, and not left to be gathered or inferred from it, in which latter case, before equitable pleas were allowed

at law, it was said the defence was in equity only (c). In the latter case therefore it will be advisable to plead

the election by way of equitable plea (d).

Acceptance by the widow of a conveyance from the heir-by conveyablaw in lieu of dower, is a good bar, so also of a bond (e).

Satisfaction by conveyablaw in lieu of dower, is a good bar, so also of a bond (e).

The action for dower unde nihil habet might be barred by the Statute of Limitations, Con. Stat. ch. 88, s. 1 (f).

The Act of 24 Vic. ch. 40, also gave a bar.

Satisfaction by conveyance, &c. from heir-at-law. Bar by Stat. of Limitations, Con. Stat. c.88, s.1.

<sup>(</sup>a) Gibson v. Gibson, 1 Drew. 51; see also generally Baker v. Baker, 25 Q. B. U. C. 448; Walton v. Hill, 8 Q. B. U. C. 562; Pulker v. Brans, 13 Q. B. U. C. 546; Parker v. Sowerby, 4 De G. M. & G. 321; Paker v. Hammond, 12 Grant 485; McLennan v. Grant, 15 Grant 65; Pairweather v. Archibald, 15 Grant 255.

<sup>(</sup>b) Sopwith v. Maughan 30 Bea. 235.

<sup>(</sup>c) Walton v. Hill, 8 Q. B. U. C. 562, per Robinson, C. J.

<sup>(</sup>d) As to pleading the election see Walmsley v. Walmsley, 26 Q. B. U. C. 392; Breakenridge v. King 4 Q. B. U. C. O. S. 180, and Walton v. Hill, supra.

(e) Germain v. Shuert, 7 C. P. U. C. 316.

<sup>(</sup>f) German v. Grooms, 6 Q. B. U. C. 414; McDonald v. McIntosh, 8 B. U. C. 388. The authority of the cases is sustained by Draper, C. J.,

Prior to the Stat. of Wm. 4. Con. Stat. ch. 88, there was no limitation to the suit for dower (a).

Limitation to action by 32 Vic. c.7, s. 22. By the Act of 32 Vic., ch. 7, s. 22,—

"No action of dower shall be brought but within twenty years from the death of the husband of the demandant."

No provision is made for cases of disability.

Limitation by Cou. Stat. c husband was disseised.

When the husband's interest was a mere right or action, 84, s. 2, where the time which would bar the husband wil slso bar the wife, notwithstanding her coverture, and if the bar against the husband be not complete on his death, the time run against him will count as against the widow, for the Con. Stat. ch. 84, s. 2 (b), which in such case gives her dower in virtue of such right in her husband, limits the period of suit for dower to that within which such right might be enforced.

Con.Stat c.88. s. 18, limits recovery of er to 6 years.

By Con Stat. ch. 88, s. 18, "no arrears of dower, or damages on account of such arrears shall be recovered or obtained by any arrears of dow- action or suit for a longer period than six years next before the commencement of such action or suit."

Bar by deed.

Dower may also be barred by deed of the married woman executed as required by the statute authorizing this mode of bar (c).

Prior to the Stat. 37 Geo. 3, ch. 7, the mode of bar was by fine or recovery, that by fine being the most usual.

Fines and recoveries were abolished with other real actions, except in dower, by 4 Wm. 4, ch. 1, Con. Stat. ch. 27, s. 78, and the statutory bar above remains. The in-

in Begley et ux. v. St. Patrick's Association, 23 Q. B. U. C. 395, and by Stuart, V. C., in Marshall v. Smith, 34 L. J. Ch. 189, which is the only English case on the point, and Laing v. Avery, 14 Grant, 33. In Leach v. Shaw, 8 Grant, 494, Esten, V. C., expressed doubts as to dower being within the act by reason of the definition given to the word "land" in the interpretation clause, which he said seemed "studiously framed to exclude the content of the such an estate"; he thought however, that dower might be within the general meaning of sec. 1 of the Con. Stat., and held himself bound by the two cases first cited. In those cases a difficulty was felt in holding dower to be within sec. 1 inasmuch as sec. 2, which proposes to define the periods. at which the rights barred by the act shall be deemed to have first accreed does not take in the case of dower. It has been held, however, that the will not prevent the application of sec. 1; James v. Salter et al., B. N. C. 544; Grant v. Ellis, 9 M. & W. 124; see also 4 Rep. 2 a.

<sup>(</sup>a) Per Draper, C. J., in Begley v. St. Patrick's Association, super That the Statute of William applies in cases of dower, see supra, note (b) See the Statute, ante p. 212, (c) See the Statute, ante p. 212-

enience of the mode of bar by fine induced the Legise at an early period to introduce a more simple mode ar; the first Act, 37 Geo. 3, ch. 7, by analogy to the The early acts e of bar by fine required an examination in all cases. as to bar. subsequent legislation however, examination is no er requisite where the husband is a party to the deed. continues requisite when he is not a party; a distion based on no sufficient reason, and which, considg the object of the examination, should rather be the r way (a). 20 Say 3. 1.1 Veell.

married woman cannot without the concurrence of Release by husband, notwithstanding examination and certificate married woer the dower acts, release her right to dower in lands in lands of er deceased former husband (b). And it is apprehend-band. Ithough this was so decided before the Con. Stat. ch. ettling the property of married women to their sepause, and although the right released is a mere right of in, and no estate in the land, that even since that act, husband should be a party (c). It may be questionalso whether such a release would be valid if exe-1 under the Stat. 29 Vic. ch. 28, s. 22, which authorizes ease under a power of attorney from a married wothere being an examination and certificate endorsed he power as required by the dower Act (d). ion of release of the right of action to the tenant of the old is of course very different from that of assignment Assignment of ie right to a stranger, and it may well be that the the right to a w as a feme sole before a second marriage, or jointly her husband with the proper formalities if married i, may be able effectually to release to the tenant of

See remarks of Sir J. B. Robinson, C. J., in Howard v. Wilson, 9 U. C. 450.

Howard v. Wilson, 9 Q. B. U. C. 450; 10 Q. B. U. C. 186; s. c. so McGill v. Squire, 13 Q. B. U. C. 550.

See remarks as to Con. Stat. ch. 85; see also per A. Wilson, J., r.v. Wiley et al., 16 C. P. U. C. 542, and Heward v. Scott, 2 Cooper, Cham. Rep. 274.

See as to execution under a power of attorney from the wife, the rks on the Stat. 29 Vic. ch. 28, s. 22, in treating of Con. Stat.

the freehold (a), and yet that the right should not be, as it has been held not to be (b), assignable to a stranger

Decisions as to acknowled 2tificates.

Many of the decisions on Con. Stat. ch. 85 (c), enabling ments and cer married women to convey their real estate are applicable to this act as regards the effect of the language of the certificate (d), the evidence and effect of the certificate as evidence (e), and the joining of the husband (f).

This Act is not, as in Con. Stat. ch. 85, confined to adults. The Act of 32 Vic. ch. 7. s. 23 (a), which takes effect on 82 Vic. c. 7. s. 28. remedies and after the first day of February, 1869, alluding to informalities in certificates, actions for dower, provides as follows:

> 23. "No such action shall be hereafter maintained in case the demandant has joined in a deed to convey the lands, or to release her dower therein to a purchaser for value, although the acknowledgement required by law at the time may not have been made or taken, or though any informality may have occurred or happened in the making, taking or certifying such acknowledgement "

> Suits pending at the time of the passing of the Act are excepted from the operation of this clause.

Questions srising on s. 28 of 82 Vic. ch. 7.

On the construction of this section, the following questions may arise:—1st. What is meant by joining in a deed? 2nd. What is the extent of the word purchaser? 3rd. Does the act virtually repeal sections 6, 7, 8, 9, and 10, of the Con. Stat., and the necessity for acknowledgement as named in those sections after as well as before the passing the act?

What is meant by joining in a deed to release dower.

As regards the first point it is to be observed the Con Stat. s. 4 authorizes a married woman to bar by joining with her husband in a deed in which a release of dower is con-

<sup>(</sup>a) Ante pp. 74, 75.

<sup>(</sup>b) McAnnany v. Turnbull, 10 Grant, 298; see however, p. 69, note c, and p. 70; see also post p. 240.

<sup>(</sup>c) See the cases commented on in treating of that Act, p. 260.

<sup>(</sup>d) Monk v. Farlinger, 17 C. P. U. C. 41; Stayner v. Applegate, S C. P. U. C. 451; McNally v. Church, 27 Q. B. U. C. 103.

<sup>(</sup>e) Monk v. Farlinger, supra; Jackson v. Robertson, 4 C. P. U. C. 272; Allison v. Rednor, 14 Q. B. U. C. 459; McCammon v. Bestpre. 25 Q. B. U. C. 419; Orser v. Vernon, 14 C. P. U. C. 573; Robinson v. Byers, 13 Grant, 388.

<sup>(</sup>f) Doe d. Bradt v. Hodgins, 2 Q. B. U. C. O. S. 213.

<sup>(</sup>g) See the Act at the end of this chapter.

tained, and by section 5 she can also bar by executing either alone or jointly with other persons, a deed, &c., to which her husband is not a party containing a release of dower; if the release is to take effect otherwise than by joining with the husband in a deed, there must be an examination and acknowledgement (the necessity for which in that case more than the other is not apparent) (a). Now where the wife joins with the husband no acknowledgement is requisite, and it is well known in practice that in the great majority of cases, where acknowledgement is required by section 6, it is when the wife executes alone joining with no one: if therefore, this section is to be read according to its strict grammatical construction, as applying where the claimant joined in a deed to release dower, and so relate only to the joint execution named in section 5 of the Con. Stat., it will fail to take in the majority of cases, viz., those of sole execution by the married woman, for which there was the chief necessity to provide. What the Legislature intended to Provide for were the cases wherein a married woman without releasing dower (b), joined with her husband as a conveying party of the land itself, (and there were many such conveyances), and also those cases wherein her husband, who conveyed by a separate instrument, was no party to the release, and the necessary acknowledgement was defective. This section also presupposes that the inchoate right to dower was not alone the subject matter of the purchase, but that some interest of the husband was chiefly involved as to which the wife was extinguishing her right (c).

In order that a release by deed poll should be within the Act, it would require that the words "joined in" should receive a different construction as applied to such a release, to that which it has as applied to conveying with the hus-

C. 450.

<sup>(</sup>b) Such a conveyance, without a release of dower therein, would not be within the power conferred on married women to bar dower by 2 Vic. ch. 6, s. 3, Con. Stat. ch. 84, s. 4.

<sup>(</sup>c) Miller v. Wiley et al., 17 C. P. U. C. 368; s. c. 16 C. P. U. C. 529; ante p. 69, n. c. and p. 237.

band, and that in the former case they should be read "executed," and probably they would receive that con. struction.

What is meant by the words " purchaser for value."

As regards the extent of signification of the words "Dorchaser for value." it may be observed that the former Act of 24 Vic. ch. 40, s. 19, which is worded much as section 23 of this Act, referred merely to a "purchaser:" it would seem, however, that the variance is not material unless, indeed, the word "purchaser" in the former Act must be taken, not in its ordinary acceptation, but in its strict legal sense, as including any one who comes to an estate by his own act or agreement and not by descent, and so include a volunteer (a). The Registry Act speaks of "purchaser or mortgagee for valuable consideration," and the Act of 27 Eliz. ch. 4, of purchaser "for money or any good consideration," and the decisions under those Acts (b) would seem to be applicable to this section. As before mentioned, it has been said (c) that the purchaser to be within the Act must not be a stranger acquiring the mere right dower. It is conceived that an acquirer for value, give 11 or agreed to be given, of the whole estate, or of any partial or limited interest in it, absolutely or conditionally, is within this section; and that it would clearly include such as a mortgagee, or lessee at rack rent.

Does sec. 23 virtually abolish necessity for future acknowledgments?

As regards the third point, the question is whether this section relates to deeds executed after the passing of the act, in which case it would virtually repeal the former law as to necessity for acknowledgment, at least where the releasee is a purchaser, and (where the release is by deed poll), subject to the question above referred to as to the construction to be placed on the words "in case the claim"

<sup>(</sup>a) Bl. Com. 241; Co. Litt. 18 b.

<sup>(</sup>a) Bl. Com. 241; Co. Litt. 18 D.

(b) As to the Act of 27 Eliz., see notes to Twynes's case, Smith Lg. Cs—7

6th ed. 25, 27; Sug. Vend. 14th ed. 712; Chapman v. Emery, Cow

279; Goodright v. Moses, 2 Bl. 1019; Hill v. Bishop of Exeter, 2 Tann

69; Douglas v. Ward, 1 Ch. Ca. 79. As to the amount given to const

tute value in reference to the worth of the property, see 1 P. W. 1888

Wilson Shies & Grant 220. Poor Lange 16 Exet. 212, Sug. Van Wilson v. Shier, 6 Grant 630; Doe v. James, 16 East. 212; Sug. Veneral 13th ed. 587, note g. See also Persse v. Persse, 7 Cl. & F. 317; Owen, 3 H. & C. 88. v. Owen, 3 H. & C. 88.

joined in a deed." &c. The commencement of this tion would be broad enough to operate on deeds exeed after the Act and so let in the necessary consequence. , that no longer is any acknowledgment required by 7: it is submitted however that the expression "though eacknowledgment required by law at the time may not ve been made or taken, or though any informality may ve occurred, &c.," shews that the Legislature did not stemplate the acknowledgment not being necessary in ure; and that for the repeal of the former statutes as to nowledgment more direct enactment is requisite (a).

The nature of the right before and after the death of the As to conveyband, its capacity of being released to the tenant of the ance of right to dower to a shold, and of being assigned to a stranger, the mode how, stranger, and as to whether the assignee can sue and enforce the as to release it in his own name is elsewhere treated of (b).

the freehold

### 32 VIC. CH. 7.

ACT TO ALTER THE LAW OF DOWER, AND TO REGULATE PROCEEDINGS IN ACTIONS FOR THE RECOVERY OF DOWER IN UPPER CANADA.

ler Majesty, by and with the advice and consent of the Legtive Assembly of Ontario, enacts as follows:-

. The twenty-eighth chapter of the Consolidated Statutes of Con. Stat. U. per Canada, intituled: An Act respecting the procedure in C. c. 28 and 24 V. c. 40 ions of Dower, and the Act passed in the twenty-fourth year repealed. Her Majesty's Reign, intituled : An Act for the better assignat of Dower in Upper Canada, are repealed upon, from and r the day this Act shall come into force.

· All actions of right of dower or of dower unde nihil habet Actions of be brought and carried on according to the provisions of dower govern-Act

Dower shall not be recoverable out of any separate and dis- Dower not relot, tract or parcel of land, which, at the time of the alien-coverable out by the husband or at the time of his death, if he died seized of nature

Dwarris on Statutes, 530.

**Ante**, pp. 69, note c. 70, 76, 237, 238, and p. 257.

when aliened, thereof, was in a state of nature, and unimproved by clearing fencing or otherwise for the purposes of cultivation or occupation but this shall not restrict or diminish the right to have woodland assigned to the demandant under the thirty-first section of this Act, from which it shall be lawful for her to take firewood necessary for her own use, and timber for fencing the other portions of land assigned to her of the same lot, tract or parcel.

> The latter part of this section considerably enlarges its Under the first part, if any portion of the land had, prior to alienation by the husband or his death, been improved, the widow would not be deprived of whatever right to dower she had under the former law, which gave possibly the right to clear woodland for the purpose of actual cultivation (a). Thus, if three acres out of a lot of ninety-nine acres had been improved, the widow would have been entited to dower out of the unimproved as well as the improved portion, and all rights of clearing for cultivation the wild portion which might not have been deemed waste. The latter part of this section however, apparently by implication restrains the right to clear any of the unimproved portion, even though such clearing, under the old law, might not be deemed waste.

Action to be commenced by summons to party in possession.

4. Every action for dower shall be commenced by writ of summons and shall be addressed to the person in actual possession of the land, out of which dower is claimed and to every other person who is tenant of the freehold of the same land, and in every such writ and in every copy thereof the place and county of the residence and abode of each party defendant shall be mentioned, and the land or property out of which dower is claimed shall be described by the number of the lot or otherwise, with reasonable certainty, and such writ shall be tested as in personal actions, and may be according to the form following:

mons.

Form of sum- VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith

[naming each defendant and the To place and county of the residence and abode of each defendant.] We command you (and each and every one of you) that you

<sup>(</sup>a) See ante p. 226, note a.

ider to who was the wife of now deceased. reasonable dower which falleth to her of the freehold which her late husband, of and in [describe land and property by the number of the lot, or the part of the concersion, name of the township, city, town or place, or th such other reasonable certainty as will show out of what id and property dower is claimed , and whereof she complains it you deforce her, or that you appear within sixteen days her to disclaim any right or estate of freehold in the said land property, or to defend yourself against her claim. Witness, &c.

5. Every such writ shall bear date on the day on which it is Date of writ, 1ed, and shall be issued out of the proper office, in the county whence issuerein the lands lie, and shall be in force for six months and returnable. Il be returnable on the sixteenth day after service thereof. shall be endorsed with the 'name and place of abode of the orney suing out the same, or (if no Attorney) the name and dence of the demandant shall be endorsed thereon in like mer, as the endorsements on write of summons in personal ons; and the same proceedings may be had to ascertain ther the writ was issued by the authority of the Attorney. se name appears endorsed thereon, and who the demandant is her abode, and as to the staying proceedings upon writs iswithout authority as in personal actions.

On every such writ and on each copy thereof shall be en- Notice endorsed a notice addressed to the defendants, which may be to the ed thereon. t following:-" You are served with this writ to the intent you may enter an appearance and denial that you are tenant re freehold of the lands mentioned in this writ, or that you enter only an appearance, and take notice that unless within een days of the service hereof, you enter an appearance, with rithout such denial, the demandant will have a right to sign ment to recover as against you the dower claimed with costs nit."

. In case the demandant claims damages for detention of her Where deer, such notice shall contain a further statement that the declaims damagdant claims damages for the detention of her dower from es for deten-3 day to be stated in the notice.

tion. &c.

Any defendant named in the writ may appear within the Defendant appointed and with the appearance, may file a notice ad-may appear sed to the demandant setting out that he denies that he is anoy, &c.

tenant of the freehold of the lands mentioned in the writ. denial shall as against that individual defendant be tal admit the claim of the demandant to dower as stated writ.

Effect of appearance without denial.

- 9. Any defendant named in the writ may appear with time appointed, and, by filing an appearance without su nial, shall be taken to admit that he is tenant of the freeho shall not afterwards be allowed to deny the same.
- Tenant in possession not also tenant of tify landlord.
- 10. Every tenant in possession who is not also tenant freehold and who is served with a writ under this Act freshold to no. forthwith give notice thereof to his landlord or other person whom he entered into possession, under the penalty of for the value of three years' improved rent of the premises possession of such tenant, to the person under whom he into possession, to be recovered by action of debt to be t in either of the Superior Courts of Common Law in Ontal

Penalty.

Landlord may apply to court to be substituted as defendant.

11. The landlord or other person under whom such ter is mentioned in the next preceding section, holds or enter possession, may, if he has not been served with the writ of apply to the Court or a Judge upon affidavit, that he is of the freehold, and is advised and believes that there ground for disputing the demandant's claim to dower. Court or Judge may, after summons to or rule upon the d ant, order that such applicant be substitute I as defendant action, in lieu of the tenant in possession, upon such condi shall to the Court or Judge appear just.

If no person in actual occupation, how

12. If no person be in actual occupation of the l which the demandant claims dower, the writ shall neve writ is served, be served on the tenant of the freehold, who shall be therein.

Writ to be served personally except in certain cases.

13. The writ of summons may be served in Ontario, service shall be personal whenever that is practicable, demandant may, on affidavit, apply from time to time, e the Court out of which the writ issued or to a Judge of Court in Chambers, and if it appear to such Court or Jureasonable efforts have been made to effect personal servi either that the writ has come to the knowledge of defen that he wilfully evaded service of the same, and has not a thereto, such Court or Judge may, by rule or order, gran to the demandant to proceed as if personal service had

fected, subject however to such conditions as to the Court or Judge seems fit.

14. In all cases where the tenant of the freehold resides out of How writ may Ontario, the demandant may issue a writ of summons in the be served form above set forth by giving a sufficient number of days, not resides out of less in any case than twenty-one for the defendant to appear, ac-Ontario. cording to the distance of the place of the defendant's residence. and having due regard to the means of and reasonable time for postal or other communication; which writ of summons shall bear the same indorsement and notice or notices as the writ of summons hereinbefore set forth, making such changes as the nature of the case renders indispensable.

15. Upon the Court or Judge being satisfied that such writ has Proceedings been personally served upon the defendant, or that reasonable where writ efforts have been made to effect personal service thereof on the sonable efforts defendant, so resident out of Outario, and that it came to his to serve deknowledge, and that he has not appeared, such Court or Judge failed, &c. may from time to time, direct that the demandant may proceed in the action in like manner as if the defendant had been served nader this Act in Onturio, subject to such conditions as to such Court or Judge may seem fit, having regard to the time allowed to the defendant to appear, being reasonable, and to the other circumstances of the case.

16. Any defendant named in the writ, may within the time Defendant appointed, file an appearance and acknowledgement that he is ten- may file apant of the freehold of the land named in the writ, together with acknowledge his consent that the demandant may have judgment for her dower tenancy. therein, and may take the proceedings authorized by this Act to have the same assigned to her, unless the parties shall otherwise Afree, and he shall forthwith serve the demandant or her Attorney with a copy of such appearance, acknowledgement and consent, together with an affidavit of the day of the entering and fling the same in the proper office, and in every such case when Judgment of the defendant so admits the right to recover, the demandant may seizin and enter judgment of seizin forthwith, and may obtain a writ of as-ment thereon. signment of dower in manner hereinafter specified, but she shall not be entitled to tax or recover the costs of suit or entering such Judgment against the defendant.

writ of assign-

17. In case an appearance be entered with a denial by the de- Proceedings fendant that he is tenant of the freehold, the demandant may at when appearance and denial filed.

once and without further pleadings take issue on that denial and make up an issue book, setting out the writ, the appearance and denial and the issue thereon, and may give notice of trial and proceed to trial as in personal actions, and if she obtains a verdict she shall be entitled to costs and to enter judgment of seizh of her dower, as against such defendant.

Proceedings if 18. In case only an appearance be entered, the demandant may only appearance entered.

at onc. declare, and when damages are claimed in the writ, they may also be claimed in the declaration which may be to the effect following:

In the (the style of the Court)

County of to wit: The day of 18

Form of declaration.

A. B., widow, (as the case may be) who was the wife of C. B. deceased, by her Attorney, demands against (the defendant) the third part of (the land and premises as described in the writ) with the appurtenances in the (township, &c.,) of

in the said county of as the dower of the said A. B. of the endowment of C. B., deceased, heretofore her husband, whereof she has nothing (and if damages are claimed) and she also claims damages for the detention from her of her endowment in the said lands from the

## 18 and she claims \$

To what extent C. L. P. Act relative to pleas, demurrers, replications and subsequent ply.

Act relative to pleas, demurrers, replications and subsequent pleadings, and the periods appointed within which the same must be pleaded, and in which notice of trial must be given and countermanded, and as to amending pleadings, and as to practice not herein provided for, and making all or any other amendments and also the rules of Court, from time to time in force relative to pleading and practice, shall, so far as they can be made apply to and regulate the course and practice of pleading and procedure in actions of dower.

Special cases. 20. Special cases may be stated by leave of the Court, or a Judge in like manner as in other actions.

Mode of estimating damages for de-21. In estimating damages for the detention of dower or the yearly value of the lands, for the purpose of fixing a yearly some of money in lieu of an assignment of dower by metes and boards.

of permanent improvements made after the alienation tention of nds by the husband or after the death of the husband dower, &c. be taken into account, but such damages or yearly value estimated upon the state of the property at the time of nation or death, allowing for the general rise, if any, in and value of land in the particular locality.

difficulty may arise on this section when the right How does s. became consummated by the death of the hus-21 apply in respect of anfore 18th May, 1861 (24 Vic. ch. 40), in which case nuity in lieu 26 to 40 both inclusive, which provide for the writ improvements ment of dower after judgment, and (s. 31) for fixing when husband value in lieu of assignment by metes and bounds, May 18, 1861. pply (see s. 42). The Act of 24 Vic. which as to an in lieu of dower has provisions somewhat analogous te Act, did not apply as respects such provisions ' e husband died before 18th May, 1861, and is more-The 24th section of the late Act provides iding actions may be carried on to judgment as if it been passed. Section 43 enacts that in cases not e provided for, the pleadings and proceedings shall ated as they were before 10th August, 1850 (13 & 1.58, Con. St. ch. 28). The question may arise therev far where the husband died before 18th May. ere is power to assign an annuity in lieu of dower, r far the old law is to govern in cases where imnts have been made after alienation by the husafter his death (a).

vhat the same question arises when the husband The old law as r 18th May, 1861, and the execution issued before to dower out of improve-

Except so far as regards the question above re-ments. of power to assign an annuity in lieu of dower, ion would seem to be unlimited and retrospective. case of Doe Riddell v. Gwinnell (1 Q. B. 682), all orities on the subject of the widow being allowed

also remarks under section 24, and as to the old law, dower es in regard to improvements, see Park on Dower, 256, 301; Litt. 32 a, note 8; Norton v. Smith, 20 Q. B. U. C. 213; cCallum, 13 C. P. U. C. 163; Robinet v. Lewis, Draper's Bishoprick et ux v. Pearce, 12 Q. B. U. C. 306.

dower out of improvements were considered, and t appears to conflict as to the old law with the author our courts. It was there held that the widow was to a third in value, estimating the value as it was time of the assignment, though they had been impl value after the conveyance by the husband by b erected thereon. And that though since the convey the husband, the lands had passed into the hands of persons, and one third at least had not been built was entitled to dower out of the lands in possession person.

Time for bringing action.

22. No action of dower shall be brought but within years from the death of the husband of the demandant.

This section was before treated of (a).

Cases where be maintained.

23. No such action shall be hereafter maintained, in action not to demandant has joined in a deed to convey the land or t her dower therein to a purchaser for value, although the ledgment required by law at the time may not have been taken, or though any informality may have occurred or l in the making, taking or certifying such acknowledgmen

This section was before treated of (b).

Pending accontinued.

24. All actions of dower which shall be pending at tions may be this Act shall come into force, may be continued and carr judgment in like manner as if this Act had not been pass

> It must be borne in mind that this section is lin proceedings before judgment. After judgment this apply, except where the husband died before 181 1861, when sections 26 to 40 will not apply (s. such latter case the proceedings on the execution apparently conform to the old law as it existed be Vic. ch. 40 (as that Act by its sixteenth section. apply and is moreover repeated) except so far as a law may be controlled by sections 3 and 21 of this It may be also that sections 26 to 40 will not apply the writ of execution has issued before the Act.

<sup>(</sup>a) Ante p. 236.

<sup>(</sup>b) Ante p. 238.

<sup>(</sup>c) See also observations as to section 21.

- 25. Unless where it is in this Act expressly declared to the When costs contrary, costs shall be taxed and allowed to, and be recoverable recoverable. by either party, in an action of dower, in like manner as in personal actions, and writs of execution to levy the same, with damages, where damages have been adjudged, may be sued out and executed as in personal actions.
- 26. After judgment has been rendered in the demandant's Effect of judgfavour to recover dower, whether with or without costs or damment for demandant.

  26. After judgment has been rendered in the demandant's Effect of judgment for demandant.

  26. After judgment has been rendered in the demandant's Effect of judgment for demandant.

  27. After judgment for demandant.

  28. After judgment for demandant.

  29. After judgment for demandant
- 27. The Sheriff, on receipt of such writ, shall by writing under Sheriff to aphis seal of office, appoint two resident freeholders of his County point Commissioners to who are rated on the assessment roll for real estate of a value not admeasure the less than two thousand dollars each, and a licensed deputy provincial surveyor, and each of whom would in other respects be eligible to serve as a juror between the parties named in the said writ, to be Commissioners to admeasure the dower, and the Sheriff shall in such writing set out a copy of the writ of assignment, and shall name therein a day on or before which the Commissioners shall make and return to him a report of their proceedings, and determination in the execution of the duty assigned to them.
- 28. In case of the death of, or refusal by, any or all of the Provision in Commissioners so appointed the sheriff shall, from time to time, case of death, at o, of Comin like manner, appoint another or others to perform the duty of missioners.
- 29. Every Commissioner so appointed shall, before entering Oath of Comupon the execution of his duty, take and subscribe an affidavit in missioners. the form or to the effect following, which oath any person duly suthorized and appointed to take affidavits in the Superior Courts of Common Law, is hereby empowered to administer, and the said Commissioners shall annex to their report the affidavits sworn by them, and return them to the sheriff.
  - "I , do swear that I am not of kin to the Form of oath. demandant (naming her) nor to the defendants (naming him or them) nor in any way interested in the lands out of which the assignment of dower is to be made by me, and that I will honestly,

impartially, and to the best of my skill and ability, execute and perform the duties imposed upon me by the appointment of

Esquire. Sheriff

of the county of , as a Commissioner for the admeasurement of dower between the said demandant and the said defendants according to law."

30. After taking and subscribing such affidavit. the Commis-Commissioners when sioners and each of them shall, for all purposes in the fulfilment sworn to be officers of the of the duties by law required of them, be considered as officers of Court. the Court out of which the writ of assignment is issued, and shall be entitled to the same immunities and protection and be subject to the same liabilities and proceeding as a Sheriff, in the discharge

Their duties.

of his duty.

31. It shall be the duty of the Commissioners-

To admeasure dower by bounds &c. :

1. To admeasure, designate and lay off without delay, by sufficient marks, descriptions, boundaries or monuments, one-third of the lands and premises mentioned in the writ of assignment, according to the nature of the land, whether meadow, arable, pasture or woodland, being a part of the lot or parcel of land and premises mentioned in the writ, and having always due regard to the nature and character of the buildings and erections on such lands and premises;

a-certain improvements. &c. ;

2. To ascertain and determine what permanent improvement have been made upon such lands and premises, since the death of the demandant's husband or since the time her said husband alienated the same to a purchaser for value, and if it can be dope they shall award the dower out of such part of the lands, as denot embrace or contain such permanent improvements, but i that cannot be done they shall deduct either in quantity or value. from the portion to be by them allotted or assigned to the de mandant in proportion to the benefit she may or will derive from the assignment to her as part of her dower of any part of suc1 permanent improvements;

and where Commissioners cannot assign bounds, &c., to assess a yearly sum.

3. If, from peculiar circumstances, such as there being a ma or mills, or manufactory, upon the land, the Commissioners case not make a fair and just assignment of dower by metes arm bounds, they shall assess a yearly sum of money being as near may be one-third of the clear yearly rents of the premises, after deducting any rates or assessments payable thereon, and in assessments rearly sum they shall make allowances and deductions nent improvements, as above provided for, and in their the Sheriff, they shall state the amount of such yearly Evidence to be set forth all the evidence taken by them in relation to on oath. such evidence to be reduced to writing and taken upon th any one of the Commissioners is hereby authorized to :), and to be subscribed by the witness examined;

vearly sum shall be a lien upon the lands mentioned Such sum to be it of assignment, unless the Commissioners specially alienonlands, erwise and make the same issuable and payable out or wise directed. ific portion of such lands, and the same shall be reby distress as for rent or by action of debt against the the freehold for the time being;

unless other-

report of the Commissioners shall be in writing, sub-Report of them and directed to the Sheriff and shall contain a Commission. ent of their proceedings, and, where the dower is asmetes and bounds, shall distinctly point out and desame and the posts, stones or other monuments desige boundaries, and, for the purpose of planting and such posts, stones or monuments, they may, if necessary, min-bearers and labourers.

e Sheriff may in his discretion upon the request of the Sheriff may oners, enlarge the time for making their report, for not enlarge time ten days, and he shall, within twenty-four hours after t thereof, endorse thereon the day and hour of such id he shall then forthwith return the writ of admeasof dower, together with the report and all papers anreto, to the office wherein the suit was commenced and Report to be , and the Deputy Clerk of the Crown, into whose office returned to Deputy Clerk and other papers have been returned, shall, on the ap- of Crown. of either party, transmit the same to the proper prinin Toronto, in like manner, and on the same conhe is required to transmit any record of Nisi Prins at to the same liabilities, in case of his default,

her party may, after the expiration of ten days from Either party of the Sheriff's return to the writ of assignment, pro- may apply to 1 ten days have elapsed before the first day of the term port. such filing, and if not, then within the first four days ceeding term, apply for, and the Court may grant a

thereon.

rule calling upon, the the opposite party to shew cause why the Commissioners' report should not be set aside upon grounds appreent on the report and papers filed therewith and upon such other grounds, as the Court may see fit, the same being supported by affidavit and every such ground being set forth in the rule; and the Court after hearing the parties may order the report to be varied or amended, if in their judgment they have sufficient mat-Order of Court ter before them to amend by, or may annul and set saide the report and may appoint three new Commissioners or direct that the Sheriff shall do so, and such new Commissioners, shall have the same powers and execute the same duties, and be subject to the same conditions and responsibilities as are in that behalf hereinbefore expressed, and the report of such new Commission-

Effect of report being moved against for miscouduct. &c.

34. If the report is moved against upon the ground of any misconduct or fraud on the part of the Commissioners, the Court may, in its discretion, make them parties to the rule, and if wilful misconduct or fraud be established in the opinion of the Court, the report may be set aside and the Commissioners be adjudged to pay to the parties injured all the costs which have been incurred and have been rendered useless by such misconduct or fraud, and all the costs of the rule to set aside the report, and such payment may be enforced by the like process and proceedings as are or may be in use to compel a Sheriff to pay costs of any rule or summary proceeding against him.

ers shall be treated as if no other report had been previously made and shall be dealt with and proceeded upon accordingly.

Costs of rule.

35. The rule to set aside the report may be discharged, with or without costs, and the Court may order the party at whose instance, or on whose complaint or representation, the Commissioners may have been made parties to the rule, to pay such Commissioners their costs of answering the same, and if the rule be discharged, or if the report be not moved against within the Copy of report proper time, or if the Court refuse to grant a rule to shew cause, the report shall thenceforth be final and conclusive on all partices to the dower action, and a copy of such report certified by Clerk of the Crown, under the seal of the Court, shall be register tered in the Registry office of the County or place where lands lie, for which service the Registrar shall be entitled

when final to be registered.

36. After such registration the demandant shall be entitled

Demandant

receive one dollar.

out a writ directed to the proper Sheriff, commanding him to may then sue her into possession of the lands and premises assigned and possession. seasured to her for her dower, and to levy all such costs as by judgment and any rule of Court, or either, shall have been irded to her against the tenaut.

17. In case judgment shall have been given against the If judgment andant and costs be awarded to be paid by her to the defend- against deby such judgment, or by any rule of Court, such defendant fendant may vissue a writ of fieri facias to recover the same.

issue fi. ta.

8. In case it is desired by either party to produce any wit- Mode of proses before the Commissioners, such party may, on application curing attendance of withe Court out of which the writ of assignment issued, or to any nesses before lge of either of the Superior Courts of Common Law, on affi-Commissionit that the evidence of any such witness is necessary, obtain an er commanding the attendance of any such witness before the

Commissioners, and, if in addition to the service of such r. an appointment of time and place of attendance in lience thereto, signed by one of the Commissioners, be served he person whose evidence is required either with or after the ice of the order, non-attendance shall be deemed a contempt Court, and shall be punishable accordingly, but the person ired to attend, shall be entitled to be paid the the same fees. vance and conduct money as if he had been subpænsed as a ess in an ordinary suit, and no witness shall be obliged to nd more than two consecutive days.

- 3. The Commissioners shall be entitled to receive from the Commissionandant the sum of four dollars for each day's attendance. not. ers' fees. ever, to exceed two, and may also charge at the rate of nty cents for every hundred words for drawing up their report. ten cents for every hundred words of each copy furnished by n to either party.
- 0. The demandant shall pay the cost of suing out and the By whom of the Commissioners in executing the writ of assignment of costs to be er, and making the report thereof, but each party shall pay ' own costs of witnesses, or of attorney, or counsel, attending e the said Commissioners.
- The demandant and the tenant of the freehold may, by any Demandant ament under their respective hands and seals, executed in the and tenant ace of two credible witnesses, agree upon the assignment of may agree

upon assignment. &c. dower, or upon a yearly sum, or a gross sum to be paid in lieu and satisfaction of dower, and a duplicate of such instrument proved by the oath of one of the subscribing witnesses, which out any Commissioner duly appointed for taking affidavit may administer, shall be registered in the Registry office of the county where the lands lie, and shall entitle the demandant to hold the land so assigned to her, against the assignor and all parties claiming through or under him, as tenant for her life, or to distrain for, or to sue for, and recover in any Court having jurisdiction to the amount, the annual or other sum agreed to be paid to her by such tenant of the freehold, and such instrument so registered thall be a lien upon the land for such yearly or other sum, and shall be a bar to any other action, suit or proceeding by the demandant for dower in the lands mentioned therein.

Sections 26 to 40 not to affect certain cases.

42. The several clauses of this Act, numbered from twenty-size to forty, both inclusive, shall not apply to or affect cases in which the right to dower became consummate by the death of the band, before the Eighteenth day of May, which was in the year of our Lord one thousand eight hundred and sixty-one. (a).

Mode of proceeding where not prescribed.

43. In all cases not otherwise provided for by this Act the pleadings and proceedings shall be regulated by the law as it was in force in Upper Canada, relative to suits and actions of dower, before the tenth day of August, which was in the year of our Lord one thousand eight hundred and fifty (b).

Short title.

14. This Act may be cited as The Dower Act of Ontario, and shall take effect upon, and from and after the first day of February next.

<sup>(</sup>a) See observations under as. 21, 24.

<sup>(</sup>b) See observations under as. 21, 24.

# CON. STAT. CH. 85.

# Act respecting the Conveyance of Real Estate by Married Women.

or to the Act of 43 Geo. 3. ch. 5, the only mode by which At com. law ried woman could convey her estate or any interest conveyance by married in was by fine or recovery, except as to leases under women was by t. 32. H. 8, ch. 28, hereafter referred to. That statute fine or recovery. Geo. 3, recited that no express provision had been for levving fines in the Province, but there can be no that fines and recoveries were introduced with other ctions and forms of procedure by the 32 Geo. 3, ch. 1: were abolished with other real actions, except on r, by 4 Wm. 4, ch. 1; Con. St. ch. 27, s. 78.

e various enabling statutes all required an examination The early stae married woman by analogy to the examination re- tutes prior to d on levying a fine, but as regards the certificate of merely direcexamination, they would appear to be merely directory tificate. e Act of 1 Wm. 4, ch. 2, under which the deed was ssly declared not to be valid unless the certificate endorsed; and the next Act of 2 Vic. ch. 6, first made Act of 2 Vic. ertificate prima facie evidence of the facts therein tificate evi-L

dence.

## SECTION 1.

Any married woman seized of or entitled to Real Estate Married woper Canada, and being of the age of twenty-one years, may, man of full age may conto the provisions hereinafter contained, convey the same, vey. ed to be executed by her jointly with her husband, to such id uses as to her and her husband may seem meet. 59 G 3, 8. l.; 2 G. 4, c. 14.

hat interests in real estate are capable of being con- what interests l under this Act, whether where the realty is directed in real estate can be conconverted into personalty, or where the interest is a veyed.

mere charge, or is a reversionary chose in action, and otherwise, is considered in treating of Con. St. ch. 73 (a).

Cases as to joint execution, examination, &c.

Where a conveyance by husband and wife was executed by each in a different place but so far as appeared on the same day, and it was duly certified by two Justices as required by this Act, this was held to be a joint execution within the Act; and Draper, C. J., said that he did not understand that the deed must necessarily be executed in presence of the husband (b). A conveyance was dated the 20th October, 1834, and the certificate shewed it to have been executed, or at least acknowledged as executed by the wife, on 17th November, 1834, it was held that even if the deed were open to an objection that the examination was after the execution, that such defect was cured by 22 Vic. ch. 35, s. 2 (s. 11 of this Act); and as regarded the joint execution, the Court recognized the case above referred to and held also that the production from the proper custody of the deed 30 years old proved a joint execution according to the purport of the deed (c). If the husband be not named as a party to the deed, then though he execute, and be referred to in the deed as husband of the wife it will not suffice (d).

Must certificate be given on day of joint execution by husband and wife?

The certificate is required by ss. 2 & 3, to be on the day of execution of the deed, and if this means the day of joint execution by both husband and wife, then apparently both must execute on the same day: if however the day of execution is to be referred to the day of execution by the wife, there is still no decided case expressly shewing that execution by the husband on a day prior or subsequent to that of execution by the wife would suffice. The preamble of the Stat. 2 Vic. ch. 6, bears on the question. It is to be observed that section 4 does not enjoin certifying on the day of execution. Whatever may be the law on the sub-

<sup>(</sup>a) Post p. 275. (b) Burns v. McAdam, 24, Q. B. U. C. 449.

<sup>(</sup>c) Monk v. Farlinger, 17 C. P. U. C. 41.

<sup>(</sup>d) Doe d. Bradt v. Hodgins, 2 Q. B. U. C. O. S, 213; Foster v. Bull, 15 Grant, 244; but these cases would not be conclusive against a deal executed under a power of attorney from the wife to which the bushess was a party pursuant to 29 Vic. c. 28, s. 22.

ies will not be precluded by the date of the ewing that in truth it was executed by both wife, or either, on a day differing from the ssibly where the date of the deed and the ry, still if the certificate states in the body the conveyance was executed on the day of ion and certificate, it would, since 2 Vic. ch. 6. prima facie evidence that the deed was executed n on that day so as to rebut the presumption of her on the day of the date of the deed; still presumption would continue as to the husband. tion of joint execution would remain.

g the cases before referred to it may be vevance is executed by a husband and dated f such execution, and the wife executes and and the certificate given on a subsequent day uffice.

on of joint execution of the deed of convey- 29 Vic. c. 28. rhat affected by 29 Vic. ch. 28, s. 22, authorizing s. 22, as to exthe wife under a power of attorney, the wife of power which would imply that where the husband of attorney. and executes the power, he need not be a xecute the conveyance, and that if he execute need not execute the former. The section is

attorney executed by a married woman for the ance of any real estate of or to which she is seized Upper Canada, or authorizing the attorney to exerring or releasing her dower in any lands or hereditaer Canada, shall be valid both at law and in equity; that she be examined and a certificate indorsed on ittorney, as required in regard to deeds and conmarried woman, under the Consolidated Statutes anada respectively, intituled: An Act respecting n Act respecting the conveyance of Real Estate by en: and provided (2) that her husband is a party es such power of attorney or the deed or other inuted in pursuance thereof, where the power is for weyance of her real estate.

It would seem that the second proviso relate the case of conveyance of real estate, and if so, act is silent as to execution by the husband i release of dower by the wife by deed poll to whice party. In such case, irrespective of this section, ex and certificate thereof endorsed on the instructure requisite (a): and it is not perhaps quite clear a case is contemplated or taken in by the act, and it does not relate solely to her "joining with he in a deed or conveyance in which a release of contained," (b), as named in Con. Stat. ch. 84, s. 4 case the act gives authority which did not be: As regards conveyance of real estate the act in if the husband execute the deed he need not expower and vice versa.

It is by no means clear that section 5 of the 6 making the certificate *prima facie* evidence of therein stated would apply to a power under thi

It may be proper where a power to convey is gi this section to add in the certificate before t "without coercion, &c.," the words, " and to execute the within deed."

The judges in Chancery have no power to examine.

The Judges of the Court of Chancery have no take an examination under the act.

#### SECTION 2.

How to convey in Upper Canada.

2. In case such married woman executes such deed Canada, she shall execute the same in the presence of one of the Courts of Queen's Bench or Common Ple Judge of the County Court, or of two Justices of the County in which such married woman resides or be when the deed is executed, and such Judge or two the Peace (as the case may be) shall examine such marriapart from her husband respecting her free and volusent to convey her Real Estate in manner and for the expressed in the deed, and if she gives her con Judge or Justices shall, on the day of the execution

<sup>(</sup>a) See aute 237.

<sup>(</sup>b) See Miller v. Wiley, 17 C. P. U. C. 371, per A. Wile

land, or in the

ed, certify on the back thereof to the following effect: 59 G. c. 3, ss. 2, 3,—1 W. 4, c. 2, s. 1,—2 V. c. 6, s. 1,—14, 15, . c. 115.

" I, (or we, inserting the name or names, &c.) do hereby rtify that on this day of ithin deed was duly executed in my (or our) presence by A. B., . wife of . one of

prantors therein named, and that the said wife of the said , at the said time and

place being examined by me (or us) apart from her husband, did appear to give her consent to convey her estate in the lands mentioned in the said deed freely and voluntarily and without coercion or fear of coercion on the part of her husband or of any other person or persons whatsoever.

#### SECTION 3.

3. In case any such married woman resides in Great Britain How in Great or I reland, or in any Colony belonging to the Crown of Great Britain or Ire-Britain other than Upper Canada, and there executes any such colonies. deced, she shall execute the same in the presence of the Mayor or Chief Magistrate of a City, Borough or Town corporrate in Great Britain or Ireland, or of the Chief Justice or a Judge of the Supreme Court of such Colony; and such Mayor or Chief Magistrate. Chief Justice or Judge (as the case may be) shall examine such married woman, apart from her husband, touching her consent in manner and form and to the effect specified in the second section of this Act, and if she thereupon gives such consent, such Mayor or Chief Magistrate, under his hand and the seed of the City. Town or Borough, or such Chief Justice or Judge under his hand, shall, on the day of the execution of such deed, certify on the back thereof to the effect hereinbefore mentioned in the said second section. 59 G. 3, c. 3, ss. 2, 5—1 W. 4, c. 2, s. 1,—2 V. c. 6,—14, 15 V. c. 115.

## SECTION 4.

4. In case any such married woman resides either temporarily How in ! or permanently in any State or Country not owing allegiance to eign sta the Crown of Great Britain, and there executes any such deed, she shall execute the same in the presence of the Governor or other Chief Executive Officer of such State or Country, or in the presence of the British Consul resident in such State or

Country, or in the presence of a Judge of a Court of Record of such State or Country, and such Governor, Chief Executive Officer, Consul or Judge (us the case may be) shall examine such married woman apart from her husband, touching her consent in manner and form and to the effect specified in the second section of this Act; and if she thereupon gives such consent, such Governor or Chief Executive Officer, under his Hand and the Seal of such State or Country, or such Consul under his Hand, or such Judge under his Hand and the Seal of his Court, shall certify to the effect hereinbefore mentioned in the said second section. 59 G. 3, c 3, s. 2,—1 W. 4, c. 2, s 1,—2 V. c. 6,—14, 15 V. c. 115.

In considering the cases attention must be given to the particular statute which governs, as the statutes sometimes vary in language.

Cases.

The Statute 1 Wm. 4, ch. 2, did not require that the place of execution should be mentioned in the certificate, but merely the place of appearance before the Justices for examination: and this place is sufficiently indicated by the marginal venue in the certificate, as, for instance, "Province of Upper Canada, Eastern District, to wit;" and the words "then and there" refer to the margin. It appeared from the deed, in this case, that it was dated 20th of October, 1834, and from the certificate that it was acknowledged 17th of November following; it was held, on objection that the examination did not take place on the day of the execution of the deed, as required by the above act, that this defect, if it really existed, was cured by 22 Vic. ch. 35, sec. 2; also that the act did not require the deed to be executed by husband and wife jointly in the presence of the justices, but only that it should be executed by her jointly with her husband, and that she should execute it in their presence. In this case, governed by the Act of 1 Wm. 4, ch. 2, the words of the certificate were: "Being separately and duly examined by us, consented thereto, and it appears to us that such consent was free and voluntary, and not the effect of coercion, or the fear of coercion on the part of her husband,

or any other person:" this was held to be synonymous with, "being examined apart from her husband, did appear to give her consent to depart with her estate, freely and voluntarily, and without any coercion on the part of her husband." Also, that the certificate as remedied by section 11 of this act, containing in substance all that the statute under which it was given required, was evidence of the fact of examination, &c., in accordance with Jackson v. Robertson, 4 C. P. U. C. p. 272.

Defendant produced a deed, upwards of thirty-one years old, with such certificate thereon, from plaintiff and her husband to the devisor of defendant's wife, and it was admitted that defendant and those under whom he claimed had been in possession during all this period; it was held, following Orse, v. Vernon that the deed with the certificate upon it, coming from the proper custody, proved itself; and that from the fact that the possession of the land had gone in accordance with it for more than thirty-one years it would be presumed that the deed as produced had been properly executed, and that everything done by the Justices as public officers, had been rightly done until the contrary was shewn (a).

Where the certificate signed by two Justices of the Peace omitted to state in the body thereof any place where the execution of the deed, dated in 1857, or the examination of the married woman took place, but in the margin, the county was given as the place wherein the Justices were authorized to act, it was held that it sufficiently complied with the statute (b).

Where the certificate endorsed on a deed, executed in one of the United States in 1859, was given by a person described as a Judge of the District Court in that State, and under the seal of the court, but it was not stated in the certificate (which would have been enough),

Monk v. Farlinger, 17 C. P. U. C. 41; see also Orser v. Vernon,
 P. U. C. 573.

D. C. 460; see also Monk v. Farlinger, supra.

or otherwise proved, that such Court was a Court of Record it was held, insufficient, (a).

Where the question was whether a deed by a married woman had been executed with the requisite formalities, and some evidence was given to show that it had been acknowledged before a Judge of a Superior Court here, it was held that the jury were rightly directed, if they should find that the deed had been so acknowledged, to presume that it was done within the proper time (b).

The certificate endorsed on a deed bearing date 18th May, 1856, was that at the Court of general Quarter Sessions, holden at, &c., "on Tuesday, the 16th day of May, 1856, personally appeared the within named S E, wife of the within named D E, and being duly examined, &c.," in the usual form, it was held sufficient, for it should be assumed that the 16th was the first day of the sessions, which might have been continued, and the certificate signed after the execution of the deed. Semble, per McLean, J., that defects in such certificate, or even the omission of it altogether, would not invalidate the deed if it were proved that the acknowledgment was in fact duly taken (c).

A certificate under the 2 Geo. 4., ch. 14, signed by the chairman, and countersigned by the clerk of the peace, and endorsed on a deed, that on, &c., personally appeared CB, within named, and being personally examined in the presence of, &c., justices of the peace, &c., touching her consent thereto, and did appear to this Court to give the same freely and voluntarily, without any coercion on the part of her husband or any other person. Held, that such certificate, though deficient in form, was good in substance (d).

A certificate which did not state that the woman was examined "apart from her husband," and no proof of that fact being given on the trial, was held insufficient (e).

<sup>(</sup>a) McCammon v. Blaupre 25 Q. B. U. C. 419.

<sup>(</sup>b) Tiffany v. McCumber, 13 Q. B. U. C. 159.

<sup>(</sup>c) Allison v. Rednor, 14 Q. B. U. C. 459.

<sup>(</sup>d) Jackson v. Robertson, 4 C. P. U. C. 272.

<sup>(</sup>e) Stayner v. Applegate. 8 C. P. U. C. 133.

conveyance of land in the Eastern District, by a marwoman, executed on the 8th October, 1821, had endorsed n it this certificate: "Personally appeared this day, in n session, the within named E B, wife of J B, who or duly examined touching her consent to alien and art with her lands within mentioned, declared that she elv and voluntarily. &c. Given under my hand, in n Court, this 10th October, 1821. (Signed), Joseph derson, Chairman." It was proved that Joseph Anderwas chairman of the Sessions, being usually chosen so, ugh not the Judge of the District Court. The defendobjected that the certificate did not state that she apred and was examined in open Court, nor that it eared to the Court that she freely, &c., nor that the art was held in and for the Eastern District: nor did it ear that she was then over the age of twenty-one; it s held, (the execution of the deed being proved by its ), having regard to the intention of the Legislature to away with the effect of informalities, (C. S. U. C. ch. 85, 3), that the certificate with the evidence was suffict (a).

The certificate on a married woman's deed, twenty-five irs old, signed by two justices, was as follows:

May, 1845, R G, wife of the within ned L G, who being examined by us, separate and art from her said husband, touching her consent to render and give up to the within named H L, his heirs lassigns, all her right and title," &c., &c.; it was held ficient—for, 1. It was immaterial that the certificate was tendorsed on the deed, but written in the margin on the e of it. 2. The venue sufficiently shewed where the unination took place: and an admission which was made the Justices' authority, must be taken to mean their hority as Justices for that district. 3. As the names of two witnesses to the deed were the same as those of the

<sup>)</sup> Morgan v. Sabourin, 27 Q. B. U. C. 230.

Justices, and the handwriting similar, and the date of the deed and certificate the same, it might be inferred that the execution took place in their presence. 4. The words "surrender and vield up" were equivalent to the statutory phrase "depart with." The motion being for a non-suit. as there was thus evidence from which a jury might have found the requirements of the Acts complied with, the rule was discharged (a).

Certificate to be evidence prima facie.

5. Every certificate given under this Act, shall be prima facie evidence of the facts therein stated. 14, 15 V. c. 115, s. 2.

This section should refer also to 2 Vic. ch. 6, s. 2, under Sec. 5 should refer also to which also the certificate is prima facie evidence. The 2 Vic. c. 6 s. 2. prior to which earlier Acts have no such provision as to certificates certificates certificates
were not evi- granted under them. The cases bearing on this section dence. are before referred to.

The officer certifying need not attest as a witness.

6. It shall not be necessary for any Judge or other Officer who may certify in any of the foregoing cases, to attest as a subscribing witness, the execution of any Deed upon the back of which he may so certify. 14, 15 V. c. 115, s. 1.

If not duly executed, the deed shall not be valid.

7. If any such Deed of any such married woman be not executed, acknowledged and certified as aforesaid, the same shall not be valid or have any effect. 14, 15 V. c, 115, s. 2—1 W. 4, c. . 2 s. 1.—59 G. 3. c. 3. s. 5.

In the statute as printed, reference is also made to 59 Geo. 3, ch. 3, s. 5, which is a mistake, as that act has no such clause, and the error is not unimportant (b).

How far conveyance by husband and wife, invalid is valid to pass terest.

It is quite clear that before the Statute of Wm. a joint conveyance by husband and wife of her estate, and of the interest of the husband, invalid for non-compliance with the as to the wife formalities as to examination, &c., enjoined by the statutes, husband's in- is void also to pass any interest of the husband (c). The

<sup>(</sup>a) Simpson v. Hartman, 27 Q. B. U. C. 460.

<sup>(</sup>b) See, per McLean, J., Allison v. Rednor, 14 Q. B. U. C. 459.

<sup>(</sup>c) Doe d. Dibble v. Ten Eyck, 7 Q. B. U. C. 600; Allan v. Level conte, 15 Q. B. U. C. 9; but see per Esten, V. C., Gillespie v. Groves 3 Grant. 589.

s of 43 Geo. 3, ch. 5, and 59 Geo. 3, ch. 3, expressly ened that "nothing in such deed contained shall have any ze or effect to bar such married woman, or her said husid, or her heirs, unless," &c. The language in the subuent statutes is different; it is, "such deed shall not be lid or have any effect unless." &c.: and it has been said ), that this may make a difference, and that under those tutes the interest of the husband may pass as at comm law, though the deed is void as against the wife and r heirs: but this again has been denied (b), and in this affict of views the author does not presume to give any It is to be remarked however, that the statutes enabling statutes, and to empower the estate of a rried woman to be conveyed, there was no necessity to power the husband to convey his interest; and it may argued that where these enabling acts declare that the sed shall not be valid or have any force or effect whatr." this means quoad only the interest as to which they e enacting and authorizing to be conveved. Something haps might be urged by reason of the change of lange in the later acts, and the omission of the name of husband.

recent case in England bears on the question. A lease made by husband and wife for seven years of lands of wife, in April, 1860, containing a covenant by the lessee I defendants as his sureties to pay rent during the term. e wife did not acknowledge under 19 & 20 Vic. ch. 120, 12, which gives power to married women to dispose of restate in lands, "save and accept that no such dissition—shall be valid and effectual unless the husband acur in the deed by which the same shall be effected, nor less the deed be acknowledged by her as hereinafter rected." The lessee entered, and occupied till August,

a) See per Blake, C., Wallis v. Burton, 5 Grant, 354; and per Richt, C. J., in Doran v. Reid, 13 C. P. U. C. 400; also the views of Esten, J., in Gillespie v. Grover, supra, and Moffatt v. Grover, 4 C. P. U. 102; and Beattie v. Mutton, 14 Grant, 688, per Spragge, V. C.

Farquharson v. Morrow, 12 C. P. U. C. 313, per Draper, C. J.;

V. Levesconte, 15 Q. B. U. C. 9.

The husband died in January, 1866, and the wife in January, 1867. The executors of the wife sued on the covenant to recover rent accrued due in June, 1866. It was contended that no action could be brought on the covenant, as the lease was void as against the wife, and the term stipulated for was never created, and Swatman v. Amber, 8 Ex. 72 (a), was relied on. The Court referred to the fact that there was nothing to shew that it was contemplated the deed should be acknowledged so as to make it conclusively binding on the wife and her heirs in case she survived, nor but that the lessee and the defendants were willing to take a lease executed by husband and wife at common law. At common law of course the lease would be good against the husband during coverture. held that the covenant bound the defendants, as the lessors had executed the deed, so as to pass the term for which the lessee and the defendants were to be taken as having contracted for, viz., a term for seven years, terminable at the option of the wife on death of the husband during the term; and that as the wife had done nothing to avoid the lease but allowed the lessee to retain possession, the lesse was subsisting up to her death, and the plaintiffs could recover (b).

Where the conveyance is void merely because the wife is a minor.

It has been suggested also that whatever may be the case as to passing the interest of the husband, where the conveyance by him and his wife is not in accordance with the formalities of the act as to examination, &c., that there may be a distinction where the deed is void as to the wife by reason merely of her nonage, and in such case the deed will not be void as to the husband (c).

Where the husband by his own deed to which the wife is no party, conveys his own interest in the lands of his wife, such deed is not open to the objections arising out of the statutes (d).

<sup>(</sup>a) See post, chapter on mortgages.

<sup>(</sup>b) Toler v. Slater, L. R. 3 Q. B. 42.

<sup>(</sup>c) Doran v. Reid, 13 C. P. U. C. 400 per Richards, C. J.

<sup>(</sup>d) Would such conveyance be valid to pass any estate as tenant the curtesy to a stranger, if made before birth of issue and before

It is apprehended that even though the conveyance by Liabilities of husband and wife should be invalid to pass any estate of husband on his covenants either, that the covenants for title of the husband, if any, for title, where are valid as matters of contract; and that a grantee for valid to pass value might after eviction recover adequate damages on estate. the covenant for quiet enjoyment (a), or enforce specific performance against the husband to the extent of his interest on the covenant for further assurance

The nature of the interest of the husband in the lands The interest of of his wife at common law, and under the Con. Stat. ch. 73, in lands of the both as regards his marital right during the joint lives of wife. himself and his wife, and as tenant by the curtesy initiate, and consummate on death of the wife, is treated of in considering the Con. Stat., ch. 73. Such interest, and the validity of conveyance of it, is of importance in the not uncommon case of conveyance by husband and wife of her inheritance and his interest in it, void certainly as to wife for non-compliance with the act.

The question of necessity for compliance with the terms Question of of this act on a conveyance by a married woman of her wife to disestate which is settled to her separate use either by virtue pose of her of the Con. Stat. ch. 73, or by deed or devise, is treated of perty as a in considering that statute, as also her power to devise feme sole without exsuch estate. amination.&c.

A release under the Registry act by a married woman Release of of a mortgage to her is considered in discussing the laws mortgage. 28 to mortgages.

Probably this act virtually repeals the act of 32, H. 8, Leases under ch 28, under which husband and wife by indenture can 82 II. 8, c 28. demise for three lives or twenty-one years, so as to bind the wife and her heirs, under certain conditions and restrictions. The point admits perhaps of doubt as the acts are all enabling acts.

(a) As to damages recoverable, see p. 104.

<sup>\$15</sup> Vic. ch. 7, s. 5, Con. Stat. ch. 90, allowing conveyances of contingent interests. See observances on that act, p. 70 and on the question of conveyance of contingent right to dower, p. 69, note c. 78,

The deed not er effect than if she was anla

8. No deed of a married woman executed according to the proto have great-visions of this Act shall have any greater effect than the same would have had if such married woman had been sole. c. 2, s. 2.

Pee for certificato

9. The sum of one dollar may be demanded for every such car-59 G. 3, c. 3, s. 2,—1 W. 4, c. 2, s. 4.

Recital.

10. And whereas it is expedient to provide for cases in which before the Fourth day of May, one thousand eight hundred and fifty-nine, informal or erroneous certificates had been indomed upon Deeds conveying real estate executed by married women jointly with their husbands, as well as for cases in which such Deeds had been executed in presence of and certificates endored thereon by non-resident Justices of the Peace, or in which certificates had been endorsed on such deeds subsequent to the execution thereof: Therefore, Whenever any certificate on the back of any Deed executed before the said Fourth day of May, one thoulid, though the sand eight hundred and fifty-nine, by any married woman, pursuant to the Act of the l'arliament of Upper Canada, passed in the first year of the reign of his late Majesty King William the Fourth, chapter two, or pursuant to the Act of the said Parliament of Upper Canada, passed in the second year of Her Majesty's reign chapter six, has been signed by two Justices of the Peace, such certificate shall be held and is hereby declared to be valid and effectual for all the purposes contemplated by said Acts, although the said Justices were not at the time residents of the District or County in which such married woman resided; and every Deed executed before the said Fourth day of May, one thousand eight hundred and fifty-nine, in the presence of such Justices, and every such certificate so signed shall have the same force, validity and effect as if the said Deed had been executed in the presence of and such certificate had been signed by two Justices of the Peace of the District or County in which such married woman at the time of the execution thereof resided. 22 V. c. 35 (1859) s. l.

Certificate under former acts to be vajustices were not revident in the county or district in which the married woman resided.

> 11. When any certificate on the back of any Deed executed by any married woman, pursuant to the Act in the last precedings section first mentioned, had, before the said Fourth day of May . one thousand eight hundred and fifty-nine, been given on # 3 day subsequent to the execution of such Deed, such certificated shall be deemed and be taken to have been given on the day which the said Deed was executed; and such Deed shall be as go

Certificate to he valid tho' given subsequent to the execution of the deed.

I valid in law as if such certificate had been in fact signed on day of the execution of the Deed to which it relates, as reired by the said Act. 22 V. c. 35, s. 2.

12. In case any married woman seized of or entitled to real Deed executed ate in Upper Canada, and being of the age of twenty-one years, by a married woman jointly d, before the said Fourth day of May, one thousand eight hund- with her husd and fifty-nine, execute, jointly with her husband, a Deed for band to be a e conveyance of the same, knowing her estate therein and in- ance notwithnding to convey the same, such deed shall be taken and consid-standing ered as a valid conveyance of the land therein mentioned, and the cate endorsed. ecution thereof shall be deemed and taken to be valid and ectual to pass the estate of such married woman in the said land. hough a certificate of her consent to be barred of her right of wer of and in such land, instead of a certificate of her consent convey her estate in the same was endorsed thereon. 35, s 3.

13. Whenever, before the Fourth day of May, one thousand And notwithht hundred and fifty-nine, the requirements of the Acts of the standing the mer Parliament of Upper Canada, or of the Parliament of the not in strict >vince of Canada, respecting the conveyance of real estate in conformity to per Canada by married women, while respectively in force, the said acts. I been complied with on the execution by any married woman a deed of conveyance of real estate in Upper Canada then beging to such married woman, such execution shall be deemed I taken to be valid and effectual to pass the estate of such mard woman in the land intended to be conveyed, although the tificate endorsed on such Deed be not in strict conformity with forms prescribed by the said Acts, or any or either of them. V. c. 35, s. 4.

the forms in

14. The four last preceding sections of this Act shall not render Act not to prelid any conveyance to the prejudice of any title subsequently judice titles luired from the married woman, by Deed duly executed and acquired, &c. tified as by law required, nor any conveyance from the married man which was not executed in good faith, nor any conveyance land of which the married woman or those claiming under her s or were in the actual possession or enjoyment on the said 1rth day of May, one thousand eight hundred and fifty-nine. withstanding such conveyance. 22 V. c. 35, s. 5.

5. The requirements necessary to give validity at law to a veyance by a married woman of any of her real estate with cessary, toconas to future conveyances.

Requirements respect to Deeds of conveyance executed since the Fourth day of May, one thousand eight hundred and fifty-nine, or after the number tinue to be so ing of this Act, shall continue to be necessary for that purpose notwithstanding anything contained in the five last preceding sections of this Act; But this section shall not affect any other remedy at law or in equity which a purchaser or other person may have upon any contract or deed of a married woman executed since the said Fourth day of May, one thousand eight hundred and fifty-nine, or which may after this Act takes effect be executed in respect of her real estate. 22 V. c. 35, s. 6 (1859.)

32 Vic., c. 9, The Act of 32 Vic., ch. 9, sec. 2, is as follows:

One certificate may embrace examination of several married women.

2. In case more than one married woman executes the same deed of conveyance mentioned and referred to in the second section of chapter eighty-five of the Consolidated Statutes of Upper Canada, the Judge or Justices of the Peace, therein mentioned, may include the examination and names of all or any number of such married women in one certificate in the form mentioned and set out in said section as far as applicable.

The necessity for this enactment?

This enactment leads to the belief that there certainly must be some decided case shewing the necessity for legislative interference, and that one certificate would not suffice under the consolidated act. If the object of the enactment had been merely to save the expense of several certificates, it would have been worded differently. In deference to such possible decision the author abstains from any expression of opinion as to whether the power professed to be given by this act has not always existed under the consolidated statute. He may say however, that if there be no such decision, it might, in any case dependant on one certificate including several examinations, be prudent not to assume that such certificate is faulty merely by reason of the Legislature having acted on that supposition.

## CON. STAT. CH. 73.

# et respecting certain separate rights of property of Married Women.

SECTIONS 1, 2, 3, 4, 19 & 20.

ery woman, who has married since the Fourth day of A married e thousand eight hundred and fifty-nine, or who marries woman may is Act takes effect, without any marriage contract or perty free nt, shall and may, notwithstanding her coverture, have, from the debts l eniov all her real and personal property, whether belong- her husband. her before marriage, or acquired by her by inheritance, sequest or gift, or as next of kin to an intestate or in any ay after marriage, free from the debts and obligations of band and from his control or disposition without her in as full and ample a manner as if she continued sole narried, any law, usage or custom to the contrary notiding: but this clause shall not extend to any property Proviso.

by a married woman from her husband during cover-12 V.c. 34, s. 1, (1859.)

very woman who, on or before the said Fourth day of A woman mare thousand eight hundred and fifty-nine, married without May. 1859, rriage contract or settlement, shall and may, from and may hold proe said Fourth day of May, one thousand eight hundred duced to posy-nine, notwithstanding her coverture, have, hold and session of her l her real estate not then, that is on the said Fourth husband. May, taken possession of by the husband, by himself or nts, and all her personal property not then reduced into ession of her husband, whether belonging to her before marin any way acquired by her after marriage, free from his id obligations contracted after the said Fourth day of May, usand eight hundred and fifty-nine, and from his control sition without her consent, in as full and ample a manf she were sole and unmarried; any law, usage or custom contrary notwithstanding. 22 V. c. 34, s. 2, (1859.)

This Act seizure in exetain cases.

3. Nothing herein contained shall be construed to protect the not to prevent property of a married woman from seizure and sale on any excution in cer- cution against her husband for her torts; and in such case, execution shall first be levied on her separate property. Ibid. s. 3.

Not to affect tenancy by curtesy.

4. No conveyance or other act of a wife in respect of her real estate shall deprive her husband of any estate he may become entitled to as a tenant by the curtesy. Ibid. s. 4.

Act not to affect marriage settlements, &c.

- As to property not coming within the contract.
- 19. Nothing in this Act contained shall be construed to prevent any ante-nuptial settlement or contract being made in the same manner and with the same effect as such contract or settlement might be made if this Act had not been passed; but notwithstanding any such contract or settlement, any separate, real or personal property of a married woman, acquired either before or after marriage, and not coming under or being effected by such contract or settlement, shall be subject to the provisions of this Act, in the same manner as if no such contract or settlement had been made; and as to such property, and her personal earnings and any acquisitions therefrom, such woman shall be considered as having married without any marriage contract or settlement. 22 V. c. 34, s. 20, (1859).
- 20. This Act shall apply and be construed restrospectively to the fourth May, one thousand eight hundred and fifty-nine, # well as prospectively, so as to give full operation and effect thereto as from the time of the passing of the 22 V. c. 34, (1859).

This Act so far as it relates to real estate is so completely subversive of the former law, and there is such dearth of cases on it, that any remarks of the author would be little more than a series of opinions on a very obscure act, and remarks on the act are confined to so much thereof effects real estate.

Rights of the husband at common law in lands of his wife.

lives.

To appreciate the change wrought by this act, a brief sketch of the rights of the husband in the property of his wife at common law may be proper (a)

As regards the freeholds of the wife, at common law, and His right dur. independently of any question of right as tenant by the cur ing their joint tesy, " by the marriage the husband acquires, and during

<sup>(</sup>a) See also, as to alienation of the husband's interest, remarks ss. 5 & 11 of Con. Stat. ch. 90, pp. 69, note c. 70.

e marriage enjoys, a freehold interest in his wife's real tate (of freehold) for their joint lives: both being seised gether in her right by entireties; the effect of which is put the ownership for the coverture entirely in the hus-Hence he can alienate this ownership at leasure; and his conveyance will pass the freehold withit the wife's co-operation (a). It has even been said that ie conveyance by the husband would pass the whole inritance of the wife, subject only to the right of entry the wife and her heirs (b). On birth of issue capable of as tenant by theriting, the husband as tenant by the curtesy initiate, by the curtesy. is a larger interest (c); and this interest becomes still rther enlarged when the husband becomes tenant by the irtesy consummate on the death of the wife. The husund's right as tenant by the curtesy is not excluded by inveyance to his wife to her separate use, unless the inntion to exclude him be clear, in which case equity ould restrain his exercise of his strict legal right (d). hough this act in the language of Draper, C. J., hereafter ferred to "operates by making a marriage settlement," ere is by the 16th and 4th sections evidence that the husand shall not be deprived of tenancy by the curtesy.

As regards the chattels real of the wife held by her in As to chattels rown right, either in possession or reversion, the hus-real of the wife. and at common law had during the coverture complete ntrol and right of disposition thereof, so that though the fe survived she would have no right as against any e, conveyance, or disposition made by the husband; unby no possibility could they have vested in the wife ing coverture (e): they were liable in execution for his

Macqueen on husband and wife, 27; see also Allan v. Levesconte l. B. U. C. 10; Gillespie v. Grover, 3 Grant, 590 per Esten, V.C.

<sup>) 1</sup> Preston on abstracts, 3 ed. p. 334; Wallis v. Burton, 5 Grant, Per Esten, V.C.; but see per Vankoughnet, C. p. 354.

<sup>2</sup> Blackstone Com. 128, Co. Litt. 30; as to conveyance by the and of his contingent interest as tenant by the curtesy, see remarks On. Stat. ch. 90, s. 5. p. 69, note c. 70.

Bennet v. Davis, 2 P. Wms. 316; Steadman v. Palling, 3 Atk. 127. See further, Shelford Stats. 7 ed. 446; Bowle's case, Tud. 2 ed. p. 49. (e) Duberley v Day, 16 Bea. 33. **2** ed. p. 49.

debts, and became his if he survived his wife by his mere marital right; but if he made no disposition in his lifetime, and died before the wife, he could not dispose thereof by will, as they had not been transferred from the wife, and she would have become entitled.

Husband's right as to choses in acaction of the wife.

Independently of conveyance by way of fine, or of statutory enactment by this act. or Con. Stat. ch. 85, the husband had power to reduce into possession the choses in action of the wife, not settled to her separate use, and to assign or dispose thereof, and no act of the wife alone could deprive him of that right. If they were not reduced into possession during the joint lives of the husband and wife, he became entitled as administrator. If she survived him she retained all not reduced into possession. If however. the interest of the wife were reversionary, and not capable of reduction into possession, and so continued during the coverture, and the wife survived, then a disposition by husband and wife did not bind the wife. If the husband survived, he being entitled by the survivorship as administrator, the disposition would be good, and binding on him. If the reversionary interest should have become an interest in possession during the lives of the husband and wife, even a prior disposition by the husband alone would then have sufficed to have enabled his assignee to have obtained the subject matter thereof. If, however, the assignee could only have obtained it through the assistance of a court of Equity, his right was subject to the wife's equity to a settle-This equity, shortly stated, is this: the court of Chancery will not assist, nor, if the wife dissent, allow, the husband or his assignee to recover or receive any property of the wife, recoverable only in that court, without settlement of a due proportion on the wife and children.

Wife's equity to a settlement.

It will be seen that this act varies materially the law as above stated, and annuls the power of the husband, and if What present it gives to the wife no greater power than before to dispose power is there of reversionary interests in choses in action, and in pure personalty, and interests, which though savoring of the realty, can only reach the wife as personalty, there would

to dispose of reversionary interests, or

seem to be no mode of effectual conveyance thereof, assum-interests ing as regards the latter interests that the Con. Stat. ch. savoring of realty? 85 would not apply.

The question of the power of disposal by husband and wife of her interest in real property, which is directed to Realty directbe converted into, and is stamped as, personalty, and is not ed to be conby the instrument under which she takes, directed to be for her separate use, is subject to some difficulty. lands are conveved or devised to trustees to be sold, and half the proceeds to be paid to the wife; or the interest of the proceeds are to be paid to a third person for life, and Ifter his death half such proceeds to be paid to the wife; and till sale in either case the rents and profits to be paid ver as the interest would be paid if sold; or where a hird person takes the legal estate for life, and after his leath the lands are to be sold by trustees, and a proportion of the proceeds paid to the wife: what power is there in either case to dispose of the interest of the wife? If the proceeds are to be held for the separate use of the wife for separate without restraint on anticipation, then, as hereafter ex-use. plained, she may convey as a feme sole, whether her interest be in possession or reversion (a). But if the separate use were not created by the instrument, but only by force of this act, then regarding the wife's interest as an interest in personalty, as it is by force of the direction to convert, her power so to dispose of her interest, even though not reversionary, is by no means clear (b). And where the interest, coming within the protection of this act, is reversionary, Reversionary though the lands be not sold, it would seem it does not so interest far savor of the realty that conveyance by husband and wife executed and acknowledged pursuant to the Con. Stat. ch. 85, would suffice. The cases in England, establishing that a married woman jointly with her husband by deed executed and acknowledged pursuant to the Imperial act

<sup>(</sup>a) Lechmere v. Brotheridge, 9 Jur. N. S. 707, per Sir J. Romilly; Keene v. Johnston, 1 Jones & Carey, Irish Rep. 255.

<sup>(</sup>b) See Chamberlain v. McDonald, 14 Grant 447, per Mowat, V. C., post p. 278.

3 & 4 Wm. 4. ch. 74. can convey a reversionary interest in realty directed to be converted into personalty, and which can only reach her as such, do not appear to be applicable That act (sec. 77) gives power to a married woman to dispose of any estate in her lands of any tenure or in money, subject to be invested in the purchase of lands (which money in equity is land), providing the disposition shall not be valid unless the husband concur in the deed of disposition, and it be acknowledged as required by the act By sec. 1, the word estate extends to any interest, charge, lien, or incumbrance, in, upon or affecting lands at law or Under that act, where a married woman was entitled to a fund to be raised out of real estate on the death of a tenant for life, it was held that a deed executed during the life of the tenant for life, by her and her husband, and the parties entitled to the estate, and acknowledged under the act, would not bar her right in case she survived (a).

In later cases this decision has been overruled, and it is settled that by deed under the act a reversionary interest of the wife in realty directed to be converted can be conveyed (b). These cases are grounded chiefly on the extended signification above referred to given in the word estate. The Con. Stat. ch. 85, however gives to the words "real estate" and "land" no signification beyond their usual import, and it may well be contended that the wife's reversionary interest in realty, which can only reach her as personalty, cannot effectually be disposed of.

Operation of this act as a marriage settlement. Draper, C. J., in reference to this act has observed (c), "I think it may be said to operate by making a marriage settlement for every woman, who, having property of her own, has married since the 4th May, 1859, without any marriage contract or settlement; and also for every woman who on or before that same day, having property of her

<sup>(</sup>a) Hobby v. Allen, 15 Jur. 835, 20 L. J. Ch. 199, s. c.

<sup>(</sup>b) Briggs v. Chamberlain, 11 Hare 69; Tuer v. Turner, 20 Bes. 560; see as to conveyance by the wife, or husband and wife, of her interests, Shelford Stats., 7 ed. p. 389, 396; Davidson Conv. 2nd ed. vol. 2, p. 122, note.

(c) Commercial Bank v. Lett, 24 Q. B. U. C. 555.

n married without such contract or settlement." Section should not be overlooked in considering sections 1 & 2, the latter part thereof has an important bearing on the ect matter of the first sections.

In a case wherein it was held that notwithstanding this The wife a married woman could not convey as a feme sole, there cannot convey as a feme sole, there legal estate some remarks as to the effect of section 13 on sections without com-2, & 19, as follows: "The wife in this case took the pliance with Con. St. c. 85, ate by force of the deed from her father. rried woman at the time, her husband, if there was issue the marriage, would have an inchoate right as tenant by curtesy; and the 13th section of the act appears to us ended to go further, and to recognise that by virtue of marriage the husband acquired other estates or interests the wife's real estate, for otherwise the provision that h estate or interest should not be subject to his debts uld be useless. During the wife's life his estate or erest as tenant by the curtesy would not be consummate. I could not be made so subject, and therefore we appreid the statute must refer to the estate he has as being atly seised with his wife, and in her right, during the erture, of her real estate, and then he is a necessary ty to the conveyance of such estate" (a).

But though to pass the legal estate the Con. Stat. ch. 85 but it is otherst be complied with, still a conveyance invalid at law wise as to her equitable intey be valid in equity as presently explained to pass the rest. litable interest, at least where the separate use is created erwise than by force of the act.

As to section 4, it is difficult to understand its sense or Section 4. ject, so far as it relates to a conveyance by the wife. plies that a married woman could convey as a feme sole thout her husband's consent, and not only that, but also at by her sole conveyance she could deprive him of his ate as tenant by curtesy, the which she could no more than a husband by his sole conveyance could deprive

Denrich v. Sullivan, 25 Q. B. U. C. 107. See also Royal Canadian Mitchell, 14 Grant, 412, per Spragge, V. C.; and Chamberlain Donald, 14 Grant, 447.

his wife of right to dower. As the wife cannot convey with her husband's assent as required by Con. Stat. ch. 8. he has without the aid of this section complete contr prevent his interest from being defeated. section relates to an act of the wife other than a conance depriving the husband of his estate, it is framed at rently under the supposition that if her estate were sold execution against her under the provisions of the state the husband might thereby lose his interest.

This section and section 16 afford an argument to st that notwithstanding the act settles property on a wor to her separate use, her husband's right as tenant by curtesy is not thereby excluded.

Can any but tion validity by the husband of his rest ?

As regards conveyance by a husband of his common the wife ques- right in his wife's lands valid at common law, but wh of conveyance under this act might be invalid for want of consent of wife, Richards, C. J., has remarked "it may be question com law inte- whether any person but the wife, or some one claim under her or for her benefit, can under this act raise question how far the disposition of the property was w out the consent of the wife (b).

Her power to contract or dispose of persenalty.

The act gives a married woman at law no greater po to contract than she had before (c). In a recent ( Mowat, V. C., remarked that he saw "great difficulty holding that a married woman has under the act no po of disposing of her personal property except by will The wording of the act as to enjoying personalty is same as in respect of realty, and it is settled she can convey realty as a feme sole, but this, as presently stat may be by reason of the original Act of 22 Vic. ch 35.

<sup>(</sup>a) Emrich v. Sullivan, 25 Q. B. U. C. 105. Ante p. 277.

<sup>(</sup>b) Doran v. Reid, 13 C. P. U. C. 401; see also Emrich v. Selli 25 Q. B. U. C. 107, per Draper, C. J.

<sup>(</sup>c) Kraemer v. Glass, 10 C. P. U. C. 473, per Draper, C. J.; Wright v. Gardner, now pending in Queen's Bench; and on the contion of the act generally, Commercial Bank v. Lett, 24 Q. B. U. C.

<sup>(</sup>d) Chamberlain v. McDonald, 14 Grant 447.

uestion as to the power of a married, woman of full How far a spose of her real estate (a) by will, or by instrument woman can by os without the consent of her husband and the instrument es required by Con. Stat. ch. 85, as distinct from inter vivos dispose of t to exercise a power or authority to appoint may lands as a dered under the following heads:

here the legal estate is vested in her, but not for mination, &c., use by force of this statute ch. 73, or otherwise. here it is only the beneficial equitable interest which

ted in her, and also not for her separate use.

here the legal estate is in the wife, and as coming e provisions of this act, is for her separate use, or virtue of the instrument under which she takes. yout restraint on alienation.

here the legal estate is by deed or will vested, not ut in trustees for her separate use without restraint ation

the above cases the power to dispose by will. e first case, as before mentioned, it has been held legal estate is common law incapacity remains, and the wife can in her but not

vev as authorized by Con. Stat. ch. 85. second case, "Equity follows the Law, and preserv- of this act, or nalogy between legal and equitable estates, requires 2nd. Where equitable estates of married women, shall be convey- only the equivivos, in the same manner as a legal estate (b)." rards the third case; where the legal estate is in for her sepa-, and by virtue of this act is for her separate use: e observed that the original statute 22 Vic. ch. 35 legal estate is at. ch. 85), enacts that "the requirements hereto- in the wife, and is for sep-essary to give validity at law to a conveyance by a arate use by woman of any of her real estate, shall continue to force of this sary for that purpose with respect to deeds of conexecuted after the passing of this act, nowithstandhing contained in this act, or in any act which has nay be passed during the (then) present session of unt;" Stat. 22 Vic. ch. 34 (Con. Stat. ch. 73), was

to realty directed to be converted, reversionary interests, and action; see pp. 275, 276.

Westbury, C., in Taylor v. Meads, 11 Jur. N. S. 167.

fema sole. without exaor consent of husband.

1st Where the for separate use by force otherwise.

table interest is in her, not

passed in the same session: Con. Stat. ch. 85 makes no mention of this: but from Bank U. C. v. Brough (a), it sppears that the original act can be looked at to guide in construing the Consolidated Statutes, at least if there be no direct conflict of expression. It must be admitted that in favor of her right to convey ss. 4 & 16 afford an argument, by enacting that no conveyance or will of a married woman shall deprive her husband of his tenancy by the curtesy, but as before remarked, section 4 on that point would appear to have little meaning in it. It has however, been decided that where the wife has in her the legal estate for her separate use by force of this act, that to pass the estate at law the Con. Stat. ch. 85 must be complied with (b). And where the legal estate is held by the wife for her separate use otherwise than by force of this act, then also to pass the estate at law chapter 85 must be complied with

or by the instrument under which she takes.

Conveyance by the wife if invalid at law to pass legal estate may be valid in equity to pass equitable interest where separate use is created otherwise than by the act,

Where on a conveyance for value the estate should fail to pass at law for non-compliance with the act, and the separate use is created otherwise than by the act, still on the principles which govern (c) in the fourth case now next to be considered, such conveyance might be recognized and enforced in equity as a good disposition by the feme of her equitable interest. It would appear, however, that it would be otherwise where the separate use is created by force of the act, for the jus disponendi which a married women possesses of property settled to her separate use by will or instrument inter vivos is withheld by this act (d).

4th. Where legal estate is in trustees for separate use of the wife.

In the fourth case, it is now settled that the Con. Statch. 85 will not apply, and that in equity the conveyance by the wife as a *feme sole* by deed or will to the extent of her interest in fee or otherwise, is a good disposition of the trust which the trustees must obey (e).

<sup>(</sup>a) 2 Err. & App. Rep. U. C. 101.

<sup>(</sup>b) Emrich v. Sallivan, 25 Q. B. U. C. 105; see also Royal Canadian Bank v. Mitchell, 14 Grant, 412; Chamberlain v. McDonald, 14 Grant, 447.

<sup>(</sup>c) See Sugd. Concise View, 147; Smith Rl. Prop. 3 ed. 1076.

<sup>(</sup>d) Royal Canadian Bank v. Mitchell, 14 Grant, 412.

<sup>(</sup>e) Taylor v. Meads, 11 Jur. N. S. 166; Lord Chancellor oversities Buckell v. Blenkhorn, 5 Hare, 131, and Lechmere v. Brotheridge, 32 Bassis; see also Hall v. Waterhouse, 11 Jur. N. S. 361, V. C. Stewart.

Fifthly, a married woman has in the first and second 5th. Power of es no power to devise, her common law incapacity reins (a). In the fourth case she has such power (b). third case; as to that branch of it which refers to the will. al estate being vested in the wife, and held for her sepae use otherwise than by force of ch. 73; it would seem it the same principles which govern, as above mentioned. the case of conveyance inter vivos, in determining ether the legal or equitable estate would pass, also govas regards disposition by will, and that the wife can vise as she thinks proper. As regards that other branch the case which refers to the legal estate being held by wife for her separate use, by force of this act, the act 18t govern: it limits somewhat the right to devise by uiring that it be exercised first in favor of children, and penses possibly to some extent with the formalities reired in other cases on execution of a will; its language 18 follows:

In dispose by

#### SECTION 16.

6. From and after the said fourth day of May, one thousand Married it hundred and fifty-nine, and hereafter, every married woman woman may devise or be-F. by devise or bequest executed in the presence of two or more queath her nesses neither of whom is her husband, make any devise or separate prouest of her separate property, real or personal, or of any rights rein, whether such property was or be acquired before or after riage, to or among her child or children issue of any marriage, failing there being any issue, then to her husband, or as she 7 see fit, in the same manner as if she were sole and unmarried ; her husband shall not be deprived by such devise or bequest any right he may have acquired as tenant by the curtesy. Vic. ch. 34, s. 16.

It common law no estate in lands, greater than for term Right to deyears, could be disposed of by will. Under the Statute vise at com-Wills, 32 H. 8, ch. 1, as explained and declared by 34 & H. 8, ch. 5, all persons might devise to any other person wills. o-thirds of their lands held in chivalry, and all held in age; and when tenures in knight service were converted o socage tenures by the Stat. 12 Car. 2, ch. 24, all lands

<sup>2)</sup> Per Westbury, C. in Taylor v. Meads, supra. (b) See last note,

to married women, infants, idiots...

became devisable except copyholds. The first sta not exclude married women, infants or idiots, but ond act, which was declaratory and explanatory Exceptions as former, enacts by sec. 14 that "wills or testaments any manors, lands, tenements, or other hereditam any woman covert, or person within the age of twe vears, idiot, or by any person of non sane memor not be taken to be good or effectual in the law." ! power therefore, of a married woman to devise la distinct from the right to exercise a power of appoin rests on the Consolidated Statute.

How under this Act must a will be executed?

82, s 18.

How the will must be executed is not clear tute of Frauds requires that a will of lands should writing signed by the party devising, or by some St. of Frauds, his presence, and by his express directions, and and subscribed in his presence by three or four Con. Stat. ch. witnesses. The Con. Stat. ch. 82, sec. 13, substitu for three witnesses, and renders it sufficient if the subscribed in presence of each other, though they n have subscribed in presence of the testator (a). observed this act, ch. 73, does not exclude an infar capacity to devise, and is silent as to the credibility witnesses, and as to the witnesses signing in presenc testatrix, or of each other, or in fact at all; and th tion arises whether the words "in the same mann she were sole and unmarried" render necessary t malities required in other cases. Do those words: the mode of execution, or merely to the power to "failing there being any issue, to the husband, or may see fit?" It may be urged that as the mode cution is expressly provided for by enjoining execu presence of two or more witnesses that the words is tion refer to the power, and that if they relate to th of execution, the former provision is superfluous, indeed so far as excluding the husband as a witness The courts no doubt would endeavor to cerned.

<sup>(</sup>a) As to the construction of these acts as regards wills, ase tions on Con. Stat. ch. 82, s. 13, p. 291.

the will of a married woman the same protection against fraud, which the Legislature by the Statute of Frauds and the Consolidated Statute have accorded to all devises of real estate: and considering this, and that the express provision made by the act as to the mode of execution may be said to be made merely for the purpose of excluding the husband as a witness, the probability is that the mode of execution of the will of a married woman to pass lands must be in the same manner as if she were sole and unmarried.

So also it would seem that those words, "in the same Can an infant manner as if she were sole and unmarried," will govern device under this act. on the question of capacity of a married woman not of age to devise. So far as the question is not governed by those words, the Statutes of Wills of Henry, above referred to. furnish argument by analogy. On their construction it has been said, that though the second act expressly excluded infants, idiots, and married women from the powers given by the first under apprehension it might extend to them (a), yet that this was not requisite, and that only those who had power to alienate before the act were thereby enabled to devise (b).

As regards the omission of the word credible in reference Must the witto the witnesses (c), the Con. Stat. ch. 82, s. 13, is equally nesses be credible? silent, and it has been held that that act only operates to change the number, and not the character of the witnesses (d): moreover, if the words, "in the same manner as if she were sole" govern, as apparently they do, the execution must be as in other cases.

In limiting the power to devise to the husband, or gen- If there be no erally to the case of their being no child, issue of any child, but a marriage, the act seems not to preclude the right to devise the wife can generally, in case of grandchildren only being living; for devise generally. though the word issue uncontrolled by the context, will

<sup>(</sup>a) Jarman on Wills, 3rd ed. 28.

<sup>(</sup>b) Powell on Devises, 3rd ed. 125, 126; Dyer, 354 B.; 1 Ves. Sr. 300.

<sup>(</sup>c) \_s to the Statute of Frauds in regard to credibility, see remarks Con. Stat. ch. 82, s. 13, p. 291.

<sup>(</sup>d) Ryan v. Devereux, 26 Q. B. U. C. 100

extend to descendants generally, in this section it is w controlled, and it relates to the immediately antecedent words, "child or children." It is apprehended that although the words "child or children." either in a statute (a) or a will (b) may sometimes include grandchildren, that in this section and section 17 they will be construed according to their strict sense.

It was hardly necessary to enact that a devise or bequest by the wife of her real or personal property should not deprive the husband of his tenancy by the curtesy; for, as regards the subject matter of a bequest, it never vet conferred an estate by the curtesy: and even in the case of a devise by the wife of a fee simple (the only devisable estate which could confer an estate by the curtesy), she could no more by devise deprive the husband of such estate, than he by his devise could deprive her of her dower.

#### SECTION 17.

Separate perty of wife dying intestate. how to be distributed.

17. The separate personal property of a married woman dyings sonal proper-intestate shall be distributed in the same proportions between her husband and children as the personal property of a husband dying intestate is distributed between his wife and children; and if there be no child or children living at the death of the wife dying intestate, then such property shall pass or be distributed if this Act had not been passed. 22 Vic. ch. 34, s. 18.

Does the word child include grandchild?

In this section as in section 16, it would seem the words "child or children" will not extend to grandchildren (c) but the construction is by no means clear, inasmuch as in the case of a husband dying intestate grandchildren are entitled.

The mode of succession to the personalty of an intestate husband leaving a widow and issue has been before referred to (d).

<sup>(</sup>a) See s. 42 of Con. Stat. ch. 82, and the remarks thereon and case ante, p. 193.

<sup>(</sup>b) See last note.

<sup>(</sup>c) See remarks on section 16.

<sup>(</sup>d) Ante pp. 204, 205.

no child be living on the death of the wife intestate hushand will be entitled either as at common law by of his marital right, or as entitled to administration. rding to the nature and position of the property (a).

### SECTION 13.

. Any estate or interest to which a husband may, by virtue Estate to is marriage, be entitled in the real property of his wife, which a husband is entiher acquired before or after the fourth day of May, one tled in the sand eight hundred and fifty-nine, or after this Act takes property of L shall not during her life be subject to the debts of the subject to his and, but this provision shall not effect the right which any debts during on, by or under any judgment or execution obtained against her life. justiand, had obtained in respect of any such estate or interest ired by a husband before the said fourth day of May, one sand eight hundred and fifty-nine. 22 Vic. ch. 34, s. 13.

is difficult to say what estate or interest is here alluded The object seems to have been to benefit the wife ugh the medium of the husband at the expense of his As before explained apart from this act the e or interest to which a husband is entitled by virtue e marriage in the freeholds of the wife is a freehold e during the coverture giving right to the pernancy e profits, and after death of the wife and birth of able issue he would be entitled as tenant by the esy. As regards chattels real he had complete power isposition during coverture. What estate or interest otected by this section? Is it the right to the perey of the profits, a right which was saleable on execution nst him (b), or the contingent interest by the curtesy, th was also saleable (c), or both these interests? It is probable that the Legislature intended to restrain the during coverture of the interest as tenant by the

Wms. Exrs. 6th ed., 1376, 656, 815; 29 Car. 2, ch. 3, s. 25; ante,

<sup>)</sup> Dalton 186. Ante p. 273.

See ante 69, note c. 71, 273; and Moffatt v. Grover, 4 C. P. . 402.

curtesy, for as it only takes effect after death of the wife the sale in her life time could be of no detriment to her. As regards the husband's right to pernancy of the profits of freeholds of the wife and to dispose of her chattels real, during coverture, that right is taken away by sections 1 2 & 19, except under section 2 in the case of real or personal estate taken possession of by the husband before 4th May, 1859; as regards real estate so taken possession of section 13 would seem to apply. So also, though the realty were not taken possession of section 2 would not protect the husband's interest against his debts contracted before 4th May, 1859, and here again section 13 would seem to apply to protect during life of the wife except in case of judgment or execution before such day (a).

<sup>(</sup>a) See as to this section Emrick v. Sullivan, ante p. 277.

## WILLS.

# Stat. Ch. 82, Sections 11, 12, 13, and the Act of 32 Vic. Ch. 8.

### SECTION 11.

When the will of any person who shall die after the sixth Estates acqui-March, one thousand eight hundred and thirty-four, condevise in any form of words of all such real estate as the will may race r shall die seized or possessed of, or of any part or propor- by the will sereof, such will shall be valid and effectual to pass any intention is at may have been or may be acquired by the devisor after expressed. aking of such will, in the same manner as if the title had been acquired before the making thereof. 4 W. 4.

provisions of the Consolidated Statute are still all tant, as the Act of Victoria only applies to testators after 1st January, 1869.

important variance between this section and the Varies from f Victoria taken from the Imp. Stat. 1 Vic. ch. 26, and Prov. Act be borne in mind, and it will be seen that by reason of of Victoria. riance, the cases on the later acts, hereafter treated not apply here. Under them every will speaks from ath of the testator, unless intention to the contrary Under the Consolidated Act the burden of proof, speak, is the other way, and after acquired real eswill not pass unless such an intention appear.

ill of lands under the Statute of Wills was considered By the former much in the nature of a testament, as of a conveyance law a will could not pass ng the uses to which the land should be subject (a); after acquired testator could no more devise freehold real estate to freeholds, uired after his will than he could or now can, (exnder Con. Stat. ch. 90, s. 5) convey at law by instru-

Bl. Com. 378; Doe d. Baker v. Clark, 7 Q. B. U. C. 44.

ment inter vivos in anticipation of acquisition (a). The will as to freeholds spoke from its date, and was only valid as to then acquired freeholds, though it should expressly profess to deal with after acquired property.

Personal estate acquired after the will could pass.

Personal estate, including chattels real, was not governed by the same rules as freehold interests, and might pass though acquired after the will. There was, however, a distinction as regards chattels real, and also as between a general and a specific bequest. Thus, a bequest of "all my leasehold estates," prima facie, and in the absence of present lease- anything from which the contrary could be inferred. smoke from the date of the will, and did not include after-acquired leaseholds, or a renewed lease, unless there were an intention apparent to that effect (b).

"all my leaseholds" meant holds.

Bequest of

A codicil might have the effect of republication ter acquired property.

General bemy leaseon same footneither case would they ed after the will.

A codicil had prima facie the effect of republishing the will, so as to make it speak from the date of the codicil. and include lands acquired before the codicil (c): but the or the will so as to pass af- codicil had not this effect if it shewed any intention to deal only with the specific property devised and no more (d).

It has been stated above that under a mere general bequest of "all quest "of all my leasehold estates" without more, leaseholds" before holds acquired after the will did not pass. For this there the act, stood is the authority of Lord Eldon, who says (e), "a leaseing as a devise hold interest for years may be disposed of by a will made of "all my fresholds" af- before the testator acquired that interest, but the general terwards; in doctrine is, that you must shew that intention." this observation to the section now under consideration, pass if acquir- it would seem that as regards freeholds, a mere general devise "of all my lands" after the Statute of William stood in the same position as a general bequest of leaseholds before that act. After acquired freeholds by the Statute of

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<sup>(</sup>a) That a deed may operate by way of estoppel, and the estoppel be fee on the acquisition of the estate does not preclude the above (b) James v. Dean, 11 Ves. 390.

<sup>(</sup>c) Goodtitle v. Meridith, 2 M. & S. 5; Re Earl's Trusts, 4 K. & J. 673

<sup>(</sup>d) Bowes v. Bowes, 2 B. & P. 500; Monypenny v. Bristow, 2 R & My. (e) James v. Dean, 11 Ves. 390. 117, 132.

liam were made as capable of being devised as afterired leaseholds were before the act, but in each case intention to pass must be apparent. In the absence of ntion apparent a general gift was ambiguous, for it ht mean to refer either to property which the testahad at the making of the will, or might have at the Under general devise of "all It has been held that under a general my real ese of his death. e of his death. It has been next that under a general my real see of "all my real and personal estate" the Consolidated tate," after-acquired protute would not operate to carry after acquired free-perty will not ls(a).

#### SECTION 12.

2. Whenever land is or shall be devised in a will made by any A devise of on who shall die after the sixth day of March, one thousand land shall be t hundred and thirty-four, it shall be considered that the de- as large an r intended to devise all such estate as he was seized of in the estate as the eland, whether fee simple or otherwise, unless it appears upon in the land, face of such will that he intended to devise only an estate for unless a conor other estate less than he was seised of at the time of trary intention be exing the will containing such devise. 4 W. 4, c, 1, s. 50.

pressed.

he language of the Imperial Act, 1 Vic. ch. 26, s. 28 is Resembles the Imp. Act. th as in this section.

Inder the old law a devise to A, simply, would pass no The former e than a life-estate, unless it appeared that the testator law. nded to devise a larger or other estate. By this section burden of proof is shifted, and on such devise the fee rhole estate of the devisor will pass, unless intention to contrary appears (b). It will be for those who con-I for a restricted effect of the will to make out the

he act only applies to estates and interests existing in The Act does testator, and not to those first created by the will. Thus, not apply to vise to A of a rent charge held by the testator in fee ed de novo by pass the fee; but if the testator devise to A an an-the will, as on devise of an

Whateley v. Whateley, 14 Grant 430, Mowat, V. C., diss.; see Gibson v. Gibson, 1 Drew. 62, per Kindersley, V. C.

See Farrell v. Farrell, 26 Q. B. U. C. 652, as to an indefinite devise ag the fee, and the circumstances which favor such construction.

annuity to A recured by wav of rent charge.

nuity, and charge it on his land. A will take but a liinterest (a).

Instances wherein before the act indefinite deenlarged to a fee.

The principles and rules of construction which govern under the old law in determining as to whether a fee or lifeestate only passes, are yet important in ambiguous wills. Even before this act an indefinite devise would be enlarged vise would be to a fee by the imposition of a charge, however small, on the person of the devisee, as on a devise to A "he paying my debts:" or on the quantum of the estate devised, as on a devise of lands to A, "my debts being paid thereout:" but not if the lands were first expressly charged, and the devise were merely subject to the charge (b). So also, if there were a gift over on the devisee dving under a specifield age (c); or under age and without issue (d).

#### SECTION 13.

Witnesses need not subscribe in the presence of the testator.

13. Any will affecting land executed after the sixth day of March, one thousand eight hundred and thirty-four, in the presence of and attested by two or more witnesses, shall have the same validity and effect as if executed in the presence of attested by three witnesses; and it shall be sufficient if me witnesses subscribe their names in presence of each other, although their names may not be subscribed in presence of the 4 W. 4, ch. 1, s. 51.

The provisions of section 5 of the Statute of Frauds ( Car. 2, ch. 3), are as follows:

Provisions of

"All devises and bequests of any lands and tenements devisable St. of Frauds. either by force of the Statute of Wills, or by this statute, or beauty force of the custom of Kent, or the custom of any borough, or any particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in h

<sup>(</sup>a) Nichols v. Hawkes, 10 Hare 342; Reay v. Rawlinson, 7 Jur.

<sup>(</sup>b) Doe d. Stevens v. Saelling, 5 East, 87, 98, per Le Blanc, J.; Doe Sams v. Garlick, 14 M. & W. 698, per Parke, B.; Burton v. Powers, K. & J. 170; Ingalls v. Arnold, 14 Q. B. U. C. 296.

<sup>(</sup>c). Burke v. Annis, 11 Hare, 232; Frogmorton v. Holyday, 3 Burnellis: Doe Wight v. Cundall, 9 East, 400.

<sup>(</sup>d) Toovey v. Bassett, 10 East, 460.

sence, and by his express directions, and shall be attested and scribed in the presence of the said devisor by three or four lible witnesses, or else shall be utterly void, and of none ct."

The variance between the Statutes of Charles and of Variance belliam is this: that by the former, the will must be tween Stats. ested and subscribed in presence of the testator by three, of Wm. our credible witnesses, who need not subscribe or attest in sence of each other, or at one and the same time: the er statute is silent as to the credibility of the witnesses. execution in the presence of and attested by two nesses, is as valid as if in the presence of, and attested three witnesses: and it is sufficient if such witnesses scribe in presence of each other, without subscribing (as gired by the Statute of Charles) in the presence of the

otwithstanding the Act of William is silent as to Witnesses ibility of the witnesses, that qualification still continues ible as under e requisite as under the Act of Charles (a).

he St. of Charles is not impliedly repealed by that of St. of Frauds liam (b). It seems clear therefore that a will invalid not fepcaled, ot complying with the latter act, is valid if it complies complying the former. In a late case (c) the court went further, with either act will suffice. held in effect that the statutes were cumulative, and the two ht be read together, and so that a will invalid under acts be amaler statute taken singly might be supported on their gamated, so t authority. Thus a will executed in the presence of valid under witnesses who subscribed in the presence of the testator, neither individually may not in presence of each other has been held sufficient. yet be upheld author does not presume to question the unanimous by their joint effect? ment of the Court, but he deems it right in a matter of importance to refer to the language of Draper, C. J. subsequent case, and to suggest that it may be a proper aution always to comply with the Statute of William,

Crawford v. Curragh, supra.

Ryan v. Devereux, 26 Q. B. U. C. 107. Crawford v. Curragh, 15 C. P. U. C. 55.

and require that where there are only two witnesses, they should sign in presence of each other. In the case referred to (a), Draper, C. J., alluding to the doctrine laid down in Crawford v. Curragh, says "I advisedly abstain from expressing an opinion of concurrence in, or dissent from, that decision. I have not arrived at any positive conclusion upon it."

Variance between this and the Imp. Act. The practitioner should bear in mind that the Imp. Act, 1 Vic. ch. 26, has in England varied the mode of execution of wills, and therefore the cases decided under that act may be inapplicable here, unless on the words "signature," "presence," "direction," "other person," "attested," "subscribed," which are common to the Imperial Act of Victoria, the Statute of Frauds, and the Provincial Act.

Attestation

The attestation clause need not shew that the requisites of the statutes have been complied with, and whether shewn or not, proof of due execution must be given. Due execution may however be presumed; and possession for a lengthened period (in one case 16 years) in those claiming under the devise, coupled with evidence that the witnesses are dead, or do not remember, and especially if the possession were with the knowledge of the heir-at-law, are matters from which due execution may be inferred (b).

Presumption of due execu-

tion

In the Court of Probate in England it has been held that the maxim omnia rite case acta will to a limited extent apply even though the witnesses should not remember all the facts requisite to the due execution, and the attestation clause should be informal (c). The same court also, where the will on its face appeared to have been duly signed, granted probate, though the witnesses denied their signatures, on being satisfied by other evidence of due execution, and that the denial of the witnesses was wilfully untrue (d): but if the witnesses deny due execution, and there be no evidence rebutting their testimony, and their

<sup>(</sup>a) Ryan v. Devereux, 26 Q. B. U. C. 107.

<sup>(</sup>b) Crawford v. Curragh, 15 C. P. U. C. 55; see also 1 Jarm. Wills 3 ed. 79.

<sup>(</sup>c) Vinnicombe v .Butler, 13 W. R. 392; Rees, in the goods of, 34 L. J. Prob. 56.

<sup>(</sup>d) Myers v. Gibson, 14 W. R. 901.

acity is not impeached, the court will not pronounce for will, though the attestation shew due execution (a). Execution of a will by a married woman made under Con, will of marit. ch. 73, s. 16 is considered in treating of that statute. ried woman.

### 32 VIC. CH. 8.

## AN ACT TO AMEND THE LAW AS TO WILLS.

1. Every will shall be construed with reference to the real and Every will sonal estate comprised in it, to speak and take effect as if it speaks from I been executed immediately before the death of the testator, tator. less a contrary intention appears by the will.

By section 6 the act shall not apply to the will of any who dies after 81st January, rson who is dead before the first day of January, 1868. 1868. Sec. 6. The act is taken from the Imperial Act of 1 Vic. ch. 26, d numerous cases decided on it are available, especially taken from the sometimes very difficult questions of intention on Imp. Act 1 Vic. c. 26. e face of the will that it shall not speak from death of the

Under this act on a general devise under the expression ill my real and personal estate" property acquired after e making of the will will pass (b), though in strictness it anot be said that such property is in the words of the t comprised in the will.

As to personal estate, except chattels real (c), the general e before the act was that a will spoke from death of testator.

A residuary devise under the former law was regarded Residuary dea specific devise of such lands as the testator then had vise will not carry properich he had not disposed of by his will, and such lands ty as to which y would pass by the residuary devise. This was a con- a devise may have lapsed. uence of regarding the will as a present conveyance (d). If therefore a testator seised of Blackacre and Whiteacre rised the former to A and the residue of his lands to B. 1 A died in the lifetime of the testator, whereby the dee to him lapsed, B would still not take Blackacre.

<sup>2)</sup> Croft v. Croft, 4 Swa. & T. 10.

b) Gibson v. Gibson, 1 Drew. 62.

<sup>(</sup>c) Ante p. 288

d) Ante p. 287; 1 Jar. on Wills, 8 ed. 610.

same doctrine applied on the devise to A failing by his disclaimer, or the illegality of the devise as contrary to the Statute of Mortmain, the rule against perpetuities or other-The Imperial Act expressly provides (sec. 25) that unless intention to the contrary appear the subject matter of the devise which fails shall be included in the residuary devise. It may be questionable whether this accords with the general intention of a testator who perhaps has disposed of the bulk of large property to others than the residuary devisee, and shewn but slight intention of benefiting It is conceived that this section of the Imperial Act was designedly omitted in the Provincial Act and that in its absence, though the will speaks, from death of the testator, and is no longer to be regarded as a present conveyance, yet the mere fact of the devise being residuary, which is intended to be but a device of what has not been excepted, and, as in the case above, is intended only to carry Whiteacre under the name of residue. would be sufficient evidence of intention that the subject matter of the devise which fails should not pass to the residuary devisee (a).

Will of minor who attains

Though the will is to speak from the death of the testsmajority inva. tor, still it would seem clear that a will made by a minor who dies after majority is not valid.

Act does not apply to the objects of testator's boun-

This section does not apply to the objects of the testtor's bounty, who are to take the real and personal estate given by the will, but only to the real and personal estate comprised in the will. A testator bequeathed the income arising from certain funds to A, a widow, for life or until her marriage, and after her death or marriage, which should first happen, he gave the principal amongst her children by two former husbands: A married again between the date of the will and the death of the testator, and he was aware of her marriage: it was held, overruling the

<sup>(</sup>a) That a residuary devise in England is no longer to be treated specific, see Hensman v. Fryer L. R. 2 Eq. 627 wherein however are was laid on the effect of section 25 of the Wills Act: see Clark v. Cark 34 L. J. Ch. 477; Pearmain v. Gwiss, 2 Giff. 130.

rision of Vice Chancellor Wood, that A was not entitled the income of the funds, but that the gift, upon her desse or marriage, came at once into operation (a). Section 2 is hereafter treated of in conjunction with secon 4.

#### SECTION 3

b. Every will shall be revoked by the marriage of the testator, Will, except ept a will made in exercise of a power of appointment when made in exercise of a real or personal estate thereby appointed would, in default cise of a power, resuch appointment, pass to the testator's heir, executor or ad-voked by marristrator, or the person entitled as the testator's next of kin riage.

The statute of Distributions.

By section 6 the act does not apply to the will of one ao is dead before 1st January, 1869.

As a general rule marriage of a man coupled with birth The former issue revoked his will made before marriage, and the law. Free marriage of a woman was a revocation of her will.

If a man before marriage has by his will made gifts to Necessity unserelatives or others, and has after marriage made no of republishment will or codicil confirming, or reiterating his will, reing existing ing on the absence of issue of the marriage as not revoking wills in certain cases.

it will now be necessary that he should make a new will, republish the old one.

In England it has been held that a void marriage, as with Void marriage deceased wife's sister after the Act of 5 & 6 William 4, as with deceased to 54, which makes such marriage void, will not revoke no revocation. will (b).

Though this act has been held not to apply to the colonies ill it was in the same case considered that such a marriage ere is void, though under certain circumstances, as for the urpose of bastardizing issue, it cannot be called in question for the death of the parties (c).

The act provides that marriage shall not revoke the will, here it is made in exercise of a power, when the estate 'Pointed would not pass to the testator's heir, executor or

<sup>(</sup>a) Bullock v. Bennett 24 L. J. ch. 512, 397; 7 De G., M. & G. 283; C. 3 Burr. (b) Mette v. Mette, 1 Swa. & Trist., 416.

<sup>(</sup>c) See p. 215 as to dower. Hodgins v. McNeil, 9 Grant, 305.

administrator, or next of kin, for the only effect of annulling such a will would be, not to vest the property in the new family of the testator, but to carry it over to the persons entitled in default of appointment.

But it is not necessary that the property, in default of appointment, must go to the new family if he have any, but only that it muy: for if a man have a general power of sppointment with the limitation in default of appointment himself in fee, and having a son by his first marriage, make his will and marry again; his will will be revoked; and vet if he die intestate the estate will descend to the son by the first marriage, in exclusion of the issue by the second. Where in default of appointment the estate is limited to a particular class of issue as purchasers, for example, to all or any of the children of a first marriage the second marriage will not revoke the will; because although in default of appointment the heir may take: vetit will not be in the character or with the quality of heir (a). And where the will was made under a power in a settlement, and then the testator married, and if there had been no will, the same persons would have taken either under the settlement or the intestacy; it was held that there was no revocation, for the persons entitled in the event of an intestacy would take under the settlement, and not under the Statute of Distributions (b).

## SECTIONS 2, 4.

No conveyance, &c., to

2. No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal preventoperation of a will estate therein comprised (except an act by which the will is reas to such in-voked) shall prevent the operation of the will with respect to terest as exists on death, such estate or interest in such real or personal estate as the testator shall have power to dispose of at the time of his death.

No revocation by change in circumstances.

4. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

<sup>(</sup>a) H. Sugden Wills, 55, 56.

<sup>(</sup>b) In re Sir Charles Fitzroy, 1 Swa. & Trist, 133.

Inder the old law the general rule was that if a testa- Old law as to seised of a freehold estate devised his whole in-revocation by implication. st, and then aliened the same to the extent of such erest, the will was revoked: but if the alienation revoked by re not to the extent of the whole interest as if conveyance, estator seised in fee should have demised for life unless conveya less estate, the revocation was pro tanto only, and a partial intedevisee would have taken subject to the demise. rest only. such a conveyance of a freehold estate were for no defie object, it revoked a previous devise; thus if the lands ised, should after the will have been conveyed to the tators use for life with remainder to his right heirs, so t it merely operated to revest the fee, the devise was Even an ineffectual conveyance had the same oked

Where however, the conveyance was a mere charge, as Not revoked ase of a mortgage in fee with power of redemption to or mere mortgagor, in the usual form, the will was not wholly charge. oked in equity, but merely to the extent of the charge, the devisee took cum onere (a).

I contract to convey or settle lands theretofore devised Revoked in rated in equity, though not at law, as a revocation or equity by contract to sell, mption of the devise, and this it would seem would be even though though the contract should have been rescinded in the rescinded, tator's life-time (b); so also if the lands were sold under or sale com-

apulsory powers given to a railway company (c). A contract for sale, unless such whereof specific perform- Revocation would not be enforced, will now as formerly, as regards law. beneficial interest, be a revocation of a prior devise of the ds sold, and the unpaid purchase money will go to the on contract of cutor or next of kin entitled to have the contract carried for their benefit, but the legal estate will go to the debe (d). If however the contract have been abandoned

pulsory.

<sup>1)</sup> As to right to exoneration, see 29 Vic. ch. 28, sec. 33, ante p. 45.
1 Jarm. Wills, 3 ed. 150.
1 Gale v. Gale, 21 Bea. 349; Smith Rl. Prop. 3 ed. 988; see how1 Jarm. Wills, 3 ed. 152.

Farrar v. Earl of Winterton, 5 Bea. 1; 1 Jarm. Wills, 3 ed. 152; Stat. 2 ed. 360, Moore v. Raisbeck, 12; Ford v. DePontes, 30

the property will now pass under the will contrary to the old law (a).

On contract to purchase.

If a man having a term of years contract for the fee and then devise the estate and die before the conveyance, the equitable fee will pass as before the statute, and the term will attend it (b): if the conveyance were made to the purchaser, or to a trustee for him, simply in fee, or pursuant to the contract before death, the devise would stand good both under the former and the present law (c).

Effect after devise of convevance by a partial interest.

The act "goes much further than simply to leave the will to operate on such interest as the testator has left in the devisor, of him under a conveyance subsequently to his will, for the nis whole estate relimit. will is to operate on such estate or interest as the testatos ing to himself has power to dispose of at the time of his death: therefor if a man were to make a will disposing of his real estate, and afterwards were to convey the whole fee to uses, or ozn trusts, relimiting or leaving any interest in himself, the interest would pass by his will; and still further, if be were afterwards to convey to a purchaser his remaining interest, and at a subsequent period repurchase the propert and die seised of it, it would pass by his will to the devisee (d).

Effect of sec. 8 may be in some cases to necessitate republication of wills now executed

As the act by section 6 will apply to all wills except those of testators who die before 1st January, 1869, it will be requisite that testators should consider how far their imtentions may be varied by the new act. Thus, if a testator having made his will disposing of some of his real estate in a particular way, should afterwards by post nuptial settlement before the act have granted such estate to the use of his wife for life and after her death to his own use in fee, and have made no alteration in his will, relying on the same being by the old law revoked by the conveyance, quoad the property conveyed (e), and in fact so intending he would find such intention defeated by this act.

<sup>(</sup>b) Sug. Stat. 2 ed. 364. (a) Sug. Vend. 14 ed. 191.

<sup>(</sup>c) 1 Jarm. Wills, 3 ed. 144, 145. (d) Sagd. Vend. 14 ed. 191.

<sup>(</sup>e) 1 Jarm. Wills, 3 ed. 136, ante p. 297.

#### SECTION 5.

5. No Will or Codicil, or any part thereof, shall be revoked Sec. 5. How herwise than as aforesaid, or by another Will or Codicil exested according to law, or by some writing declaring an intention ked. revoke the same, and executed in the manner in which a Will by law required to be executed, or by the burning, tearing or Incrwise destroying the same by the testator, or by some one in s presence and by his direction, with the intention of revoking same.

The 21st section of the English act has not been enacted It provides that no obliteration, interlineation or her alteration shall have any effect, except so far as the 'Ords or effect of the will shall not be apparent, unless such terations shall be executed as the act requires.

# SECTION 6.

6. This Act shall not apply to the Will of any person who is Sec. 6. Act ead before the first day of January, one thousand eight hundred to the will of nd sixty-nine. one who dies before 1 Jan.

As this section does not exempt from the operation of 1869. he act, wills executed before the first day of January, .869, it may be requisite in some cases by reason of the hange the new law works on such wills (as in the instances refore given) that testators should republish their wills (a).

The power and mode of devising by a married woman is Devise by onsidered in treating of Con. Stat. ch. 73.

married woman.

<sup>(</sup>a) See ante pp. 298, 295.



# SALE AND TITLE UNDER EXECUTION.

#### STATUTES.

- 13 Ed. 1, c. 18, St. Westminster-Fieri Facias and Elegit.
- 33 Hen. 8, c. 39—Crown Debts.
- 13 Eliz. c. 4-Crown Accountants.
- 29 C. 2, c. 3, ss. 14, 15—Signing Judgment—Purchasers.
- 4 & 5 W. & M. c. 20—Docketing Judgments—Purchasers.
- 5 Geo. 2, c. 7, s. 4—Fieri Facias against lands—Pleadings and proceedings in suits against executors to reach lands.
- 2 & 3 Vic. c. 11, s. 8, Imp.—Registry of Crown Debtors and Accountants.
- 24 Vic. c. 41—Repeal of Registry of Judgment—Judgments no lien on land.
- 27 "c. 13, s. 1—Sale of equity of redemption. See chapter on mortgages.
- " c. 13, s. 2—Renewal of executions.
- " c. 15—Sales of lands on fieri facias against executors
- 29 " c. 28, s. 28—Crown debts.
- 29 & 30 Vic. c. 42, ss. 5, 6—Issuing of fieri facias lands—Return of writs against goods in order of priority.
  - " c. 43—Abolition of binding effect of Crown bonds.
- 31 Vic. c. 20, ss. 58, 59-Registry of Sheriffs' deeds.
  - " c. 25 Lands and goods in one writ-Return, &c.
- Con. Stat. c. 5—Registry of Crown bonds.
  - " c. 22, s. 249—Renewal of writs.
  - " c. 22, s. 252—Lands and goods not to be in one writ-
  - " c. 22, ss. 257, 258, 259—Sale of equity of redemption See chapter on mortgages.
  - " c. 22, s. 261—Seizure of mortgage. See chapter on mortgages.
  - " c. 22, s. 268—Advertising, seizure, &c.
  - " c. 22, s. 269—Sheriff vacating office.
  - " c. 89, ss. 48, 49—Registry of judgments.
  - " c. 90, ss. 5, 11—Sale of contingent interests.

order properly to consider this subject it will be Of execution. sarv to consider the state of the law in England as as here.

e Statute of Westminster 2, 13 Ed. 1, ch. 18, was the St. Westminwhich gave a judgment creditor a right to proceed a remedy ist the lands of his debtor. Under that statute the against lands ment creditor may "have a fieri facias to the sheriff elegit. vy his debt on the lands and chattels of the debtor. at the sheriff shall deliver to him all the chattels of lebtor (saving only oxen and beasts of the plough) and alf of his land, until the debt be levied, on a reasonable or extent." It is from the election given by the ite to adopt one of the two remedies that the writ of t derives its name, and from the entry of the award of on the judgment roll, "quod elegit sibi executionem,"

Before this statute, a man could only have satision of goods, chattels, and the present profits of the s by the writs of fieri fucias or levari facias, but not possession of the lands themselves, which was a natural equence of the feodal principles which prevented the nation, and of course the encumbering of the fief with debts of the owner. And when the restriction on nation began to wear away, the consequence still coned, and no creditor could take possession of the lands only levy the growing profits, so that if the defendant ned his lands the plaintiff was ousted of his remedy; statute, therefore, granted the writ of elegit. The writ eri facius only affected the goods of the debtor, and sheriff sold them under it: the writ of levari facias ted the goods and the present profits of the lands of debtor, but not the lands themselves, and under it the iff was not authorized to sell or extend the lands, or ver them to the creditor; but could only proceed to et the rents and profits. Both these writs are yet in in England: the latter however, has become almost lete, from the more advantageous remedy given by the of elegit; whilst to the former extended operation has given in England and here, so as to affect other per-

sonal estate than was theretofore liable to seizure under it It will be observed that the statute does not authorise the sheriff to sell the goods of the debtor under the wit of elegit, but to deliver them to the plaintiff. If the plaintiff desired to sell the goods, the course was to issue a fi fa: and it is said to be more advisable to sue out a fi. fa. against goods in the first instance, and afterwards, if they are not sufficient, to sue out an elegit. The practice on the writ of elegit is for the sheriff to impanel a jury, who appraise the goods and the annual value of the lands: the sheriff delivers the goods to the plaintiff at the appraised value, and if they be sufficient the lands cannot be extended, but if insufficient the lands are extended. The sheriff does not give actual possession of the lands extended, and the plaintiff gets possession as he best can, sometimes being driven to action of ejectment. And when the creditor is satisfied out of the profits of the lands, the debtor is entitled to have the lands back again. Under this Statute of Westminster only half the lands could be extended under the writ: and when there were two elegit creditors, and the first had a mojety, the other had a mojety of the remaining moiety. So also the interest of a cestui que trust, and certain other interests of debtors in lands were not to be By the Statute of Frauds howreached under execution. ever, as will be hereafter more fully explained, the interests of cestuis que trust are made subject to execution; and by Imp. Stat. 1. & 2 Vic. ch. 110, the remedy by elegit is extended to all the lands of the debtor, and to estates in lands over which the debtor has such disposing power, as he might, without the assent of any other person, exercise for his own benefit.

The proceedings by writ of *elegit* have been briefly referred to, not only because an acquaintance with them is requisite to understand the cases wherein the writ or its effect is alluded to, but because it may be perhaps that such writ might issue in this country (a); it should be borne in mind however,

<sup>(</sup>a) Rymal v. Ashberry, 12 C. P. U. C. 342; Doe d. Henderson v. Burtch, 2 Q. B. O. S. U. C. 514. See post p. 312.

at on any such writ issued in this country, no Imperial tute subsequent to 17th January, 1822, in regard to such it, would apply (a), and therefore the writ could not ve the extended effect given to it by later Imperial actmente

The only writs of execution in use in this country ecting property, except where the Crown is concerned, the writs of fieri facias, and of venditioni exponas, and writ of sequestration, the latter only issuing out of ancerv (b).

It may be well to consider 1st, the operation of the writ feri facias as regards personal interests in lands liable to are under such a writ against goods; 2nd, its operation as ards other estates not being personal, and only to be cted under such a writ against lands.

The writ of fieri facias against goods has by provincial Fi. fa. against slative enactments, a much wider operation than it had goods. common law (c); and also, as regards both goods and Is, may now issue when it could not at common law, as instance to enforce payment of money payable under ree or order of the Court of Chancery, or by any rule or er of the common law courts (d). The operation of the t against goods as regards personal interests in lands in way will alone be considered.

Inder the writ against goods, the sheriff at common law What interest sell no estate of freehold, unless perhaps an estate pur in lands can be sell no estate of freehold, unless perhaps an estate pur in lands can be re vie (e); but he may sell a lease or term of years sa against onging to the defendant, as also a term of years belong-goods. to the wife of the defendant, the execution and sale by sheriff having the same effect as to reduction into session, as a disposal by the husband himself; if howr such term is the separate estate of the wife under the 1. Stat. ch. 73. then it cannot be sold. If a lease for rs contain a covenant by the lessor with the lessee to

<sup>)</sup> See Con. Stat. c. 9, s. 2. (b) Con. Stat. ch. 24, ss. 21, 19.

<sup>)</sup> Con Stat. ch. 22, ss. 257, 260, 261.

<sup>(</sup>e) Johnson v. Streete, Comb. 290. ) Con. Stat. ch. 24, s. 19.

convey to him the fee on payment of a named sum, on sale of the lessee's interest under execution against goods the right of preemption will not pass (a). An annuity for years may, but an annuity for life may not be sold under The sale of interests of cestuis one a writ against goods. trust, by virtue of the Statute of Frauds, is considered hereafter, as also what distinction there may be between sales under an elegit and under the writ of fieri facion Under this writ the sheriff cannot sell part of a lesse's interest (b), nor can he, it has been said, on sale of the term, turn an occupant out of possession to give possession to a purchaser, who may therefore have to resort to an

Frauds and

Sale under, is action of ejectment to obtain possession (c). within Stat. of ment by the sheriff of the debtor's interest, is affected both Registry Act. by the Statute of Frauds (d) and the Provincial Registry Acts, and therefore, unless within the exceptions in these acts, must be in writing and registered (e).

By St. of Frauds binds from delivery as against purchasers.

At common law the writ bound from the teste, but this hardship was removed by 29 Car, 2, ch. 3, s. 16, which enonly to sheriff acted that the writ should only bind from its delivery to the sheriff to be executed. This extends only to purchasers for value, and not to the defendant himself, as to whom the writ binds still from its teste, and therefore if he die after the teste and before delivery to the Sheriff the writ can be proceeded on (f).

The writ of fieri facias against lands in this province Fi. fa. against lands given by rests on Imperial Statute 5 Geo. 2, ch. 7, by the 4th section Imp. St. 5 of which it is enacted that— Geo. 2, c. 7.

> After the 29th September, 1732, the houses, lands, negross and other hereditaments, and real estates situate or being within any of the said plantations (i. e., British plantations in America)

<sup>(</sup>a) Henrihan v. Gallagher, 9 Grant, 488; 2 Err. & App. 338, 8 C. overruling on that point; Sampson v. McArthur, 8 Grant, 72.

<sup>(</sup>b) Osborne v. Kerr, 17 Q. B. U. C. 134.

<sup>(</sup>c) Doe Tiffany v. Miller, per Burns, J., 10 Q. B. U. C. 80, 81; Doe 4 Hughes v. Jones, 9 M. & W. 373, arguendo, referring to Rex v. Desay (d) Doe Hughes v. Jones, supra.

<sup>(</sup>e) Witham v. Smith, 5 Grant, 203; 31 Vic. ch. 20, s. 58.

<sup>(</sup>f) Post p. 313, n. b.

onging to any person indebted, shall be liable to and chargele with all just debts. duties and demands of what nature or adsoever, owing by any such person to his Majesty or any of subjects, and shall and may be assets for the satisfaction thereof like manner as real estates are by the law of England liable to e satisfaction of debts due by bond or other specialty, and shall subject to the like remedies, proceedings and process in any art of law or equity in any of the said plantations respectively. 'seizing, extending, selling or disposing of any such houses. ids, negroes, and other hereditaments and real estates, towards estisfaction of such debts, duties and demands, and in like uner as personal estates in any of the said plantations respectelv. are seised, extended, sold or disposed of for the satisfaction debts

Negroes it will be observed, are classed with other heretaments, which now appears singular, but as observed by e learned Chief Justice, in Gardiner v. Gardiner (a), in my of the American colonies at the time of the passing the act, negroes were as a usual thing considered part of e estate, and in some of them were so by positive law, in ich respect they occupied the same position as the serfs Russia till recently. This statute was repealed as to groes by 37 Geo. 2, ch. 119.

The leading case on this statute, and sales by force of it Gardiner v. der a ft. fa., is Gardiner v. Gardiner (b). In that case Gardiner. eaction was brought on a simple contract debt of the Among other pleas, plene administravit was aded, to which plaintiff replied lands of which the tesor died seised, as assets in defendant's hands liable to isfy the debt, and the defendant rejoined that administion had never been granted to him of such lands, to ich the plaintiff demurred, and had judgment on the de-Trer. Macaulay. J., dissentiente. On the authority of this e, many others have been decided, on questions chiefly ing on the pleadings. There is great difficulty in ap-

i) 2 Q. B. O. S. 520.

Supra. See this case considered in Reid v. Miller, 24 Q. B. U. C.

plying the statute to the case of a sale of a testator's or intestate's lands, and instances might be put where great incongruities might arise. It is not intended here to discuss the questions arising out of Gardiner v. Gardiner, for whatever doubts may have arisen on it, they are now removed by the Act of 27 Vic. ch. 15, apparently retrospective in its operation saving pending suits, which is as follows:-

# 27 VIC. CH. 15.

AN ACT RESPECTING SALES OF LAND UNDER EXECUTION AGAINST EXECUTORS AND ADMINISTRATORS.

Assented to 15th October, 1863.

Preamble Imp. Act 5, Geo. 2, C. 7 cited.

Whereas, the Courts in Upper Canada have held that under the Imperial Act fifth of George Second, chapter seven, section four, the title of a testator or intestate in real estate in Upper Canada, might be seized and sold under a judgment and execution, by a creditor of the testator or intestate recovered against an executor or administrator of the deceased, in the same manner and under the same process, that the same could be seized and sold if the said judgment and execution had been against the testator or intestate if living, and many sales have taken place, and titles been acquired under such proceedings, and it is desirable to quiet Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

Interest in the U C. deagainst an executor, &c.

1. Under the said Imperial Statute, the title and interest of Real Estate in a testator or intestate in real estate in Upper Canada might be, clared seizable and hereafter may be seized and sold under a judgment and exeon a judgment cution recovered by a creditor of the testator or intestate, against his executor and administrator, in the same manner and under the same process that the same could be sold under a judgment and execution against the deceased if living.

Sales under such seizure confirmed.

2. All such sales heretofore made and titles given thereunder are hereby declared to have passed and conveyed the title of interest of the testator or intestate in his real estate so sold and conveyed, as against any objection that may be made on the ground that real estate could not be seized and sold in the manufacture.

aforesaid under the said Act; provided always that this Act Proviso Act shall not affect any case pending at the time of the passing of not to affect this Act, in or theretofore finally adjudged by the courts of Law decided cases. or Equity in Upper Canada.

The sale of an equity of redemption on a suit against Sale of equity the mortgagor or his personal representatives is considered of redemption. in treating of mortgages.

Lands cannot be sold under a judgment against an exe-Executor de cutor de son tort (a).

The mode of pleading by a plaintiff or defendant in or-Pleadings in dinary cases where the defendant is sued in his representations. tative character should, according to the cases (b), he as fol-The defendant should, if he admits the debt, and has fully administered plead plene administravit. he must do, otherwise a judgment by default would be an admission of assets, and he would be personally liable as for a devastavit, if there were no goods of the testator to satisfy the judgment, and the judgment itself would be evidence of assets. If the nature of the case requires some other plea, as a judgment recovered against the defendant and no assets ultra (c), it should be pleaded accordingly. If the plaintiff admit the plea, he should then in his replication admit the truth of the plea, and pray judgment of assets quando, and may take a judgment by default as for

<sup>(</sup>a) Graham v. Nelson, 6 C. P. U. C. 280.

<sup>(</sup>b) Sickles v. Asselstine et al., 10 Q. B. U. C. 203; Topping v. Yardington, 6 C. P. U. C. 349; Levisconte v. Dorland, 17 Q. B. U. C. 437; Mein et al v. Short et al., 9 C. P. U. C. 245, per Draper, C. J.; Holton v Macdonald, 12 C. P. U. C 246; Mason v. Babington, 17 C. P. U. C. 149; Hogan v. Morrissy, 14 C. P. U. C. 441; Reid v. Miller, 24 Q. B. U. C. 610.

<sup>(</sup>c) The Stat. 29 Vic., ch. 28. s. 28, abolishes the former priority of certain debts over others, and requires debts to "be paid pari passu, and without any preference or priority of debts of one rank or nature over those of another." If personal assets be actually on hand can an executor by allowing a creditor to obtain judgment thereby enable him to acquire priority as against other creditors in case of a deficiency of assets? It would seem that even though in case of personal assets this should be a devastavit, it would not be so as to real assets, over which the executor has no control; ante p. 35.

Pleadings in suits against executors. want of a plea, which will be final or not without a reference or assessment according to the nature of the action: for though a plea is pleaded, it is not a plea in bar or meclusion of the action, or right of action, but rather in admission of it, and in bar only of personal liability as not chargeable with assets (a). In many cases where the plaintiff desires to proceed against the testator's lands, the replication has gone on to allege that the testator died seised of lands in Upper Canada, which by force of the statute are assets to satisfy the plaintiff's claim, and subject to the like process for satisfaction of debts as personal estate (following the words of the statute), and averring that the plaintiff is a British subject: this mode, it would appear, it is not advisable to adopt, or rather it is improper (b) to reply at all anything in reference to the lands, but in regard to that, to enter a suggestion on the roll that the testator died seised, &c.; though it would seem no suggestion is necessary (c). One reason why the replication of lands should be avoided is that if lands be replied, it would seem it compels the defendant to rejoin in confession or otherwise; for unless he do rejoin the plaintiff may sign judgment, in which case he may strike out all the prior pleadings, and sign judgment as for want of a plea, and such a judgment would, as above explained, be an admission of assets. It would appear that a suggestion of lands, so far as regards the lands, cannot be traversed (d). It seems it is not requisite that the plaintiff should aver that he is a British subject, so as to bring himself within the Statute of George; that will be assumed on a suit in our courts (e), unless the defendants set it up by rejoinder to the replication if

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<sup>(</sup>a) Mason v. Babington, 17 C. P. U. C. 149.

<sup>(</sup>b) Hogan v. Morrisey, 14 C. P. U. C. 441, and Reid v. Miller, 24 Q. B. U. C. 610, overruling Sickles v. Asselstine, 10 Q. B. U. C. 203.

<sup>(</sup>c) Mason v. Babington, supra; lands and goods are placed as regards execution on the same footing by the Statute of George, no suggestion is made as to goods, why should any be requisite as to lands?

<sup>(</sup>d) Mein et al. v. Short, 9 C. P. U. C. 245, per Draper, C. J.

<sup>(</sup>e) Duncan v. Geary, 10 Grant, 34, per VanKoughnet, C.

s be replied, by plea to a suggestion (a). And it will bserved the Statute of Victoria is not expressly conl to British subjects, unless its connection with the Imal Statute would still so confine it: and since that stathe suggestion may probably be drawn in a different more concise form than heretofore the replication under Statute of George.

regard to execution on a judgment of assets quando, Execution on is been held that no writ against goods can issue till a suits against rn of goods to a sci. fa. (b). It was also held in the e case that where the record shews that there are no ls, as on a plea of plene administravit admitted or id to be true, that the writ against lands can issue ediately on judgment without any writ against goods The state of the record in such case is valent to a return of no goods, and if a return of no is were requisite before the writ against lands could be seeded on, then if there were no goods, the lands could or be reached on a judgment of assets quando, as before writ against goods can issue there must a finding of ls on inquisition on a sci fa. It is apprehended that act of 1868, allowing writs against lands and goods, not affect the right to proceed now according to the re decision

or some time it was doubted whether the act of Geo. 2 in force in this province, as at the time of its passing ada was not a British colony, and it was not considered r that the Provincial Act 32 Geo. 3. ch. 1. introducing law of England, did thereby introduce this statute h was not part of the general law of England. settled, however, on appeal to England, in a case of v. Willcocks (c), that the statute was in force in Up-Sanada.

How and when such a defence should be set up, see Wood v. Cample Q. B. U. C. 269; Doe d. Richardson v. Dickson, 2 Q. B. O. S. 295, Obinson, C. J.; Hearle v. Ross, 15 Q. B. U. C. 262, 263.

Mason v. Babington, 17 C. P. U. C. 149.

See Gardner v. Gardner, 2 Q. B. O. S., per Robinson, C. J., p. 537.

What interests affected by the writ

The interests in real estate which are affected by the writ against lands, and the judgment on which it issues against lands, from what time, and the course of proceeding to and after sale, are now to be considered.

Effect of judgments as

In considering what interests are affected by the writ binding lands, it may be well to take a short retrospective view of the various Provincial Statutes rendering indoments liens on lands, and the cases on the subject; for though the effect of judgments as a lien on lands is abolished by stat. 24 Vic. ch. 41. still questions are constantly arising as to the effect of such liens, and many titles depend on them.

As before remarked with reference to the writ of elegit, a judgment at the suit of a creditor did not, nor did any proceedings on it affect the lands of the debtor, from the early feudal doctrine that the tenant could not alien or encumber his land. In process of time this restraint somewhat wore away, but before the statute " quia emptore, it is generally thought the proprietor of lands was enabled to alien no more than the moiety (a);" so far as regarded the indement creditor however, the consequence of the earliest feudal rule continued, till the Statute of Westminster? gave the writ of elegit, as above mentioned, and the star tute therefore permitted only so much of the lands to be affected by the process of law as a man was capable of alienating by his own deed. On the passing of this tute a judgment became a lien on a moiety at least of the lands of the debtor, not only from the time of its actual recovery, but sometimes by a fiction of law, even from antecodent period. Judgments at one time were only given in term when the Court sat; and when subsequently cotain judgments were allowed to be recovered and entered out of term, the appearance of their having been actually given in term was still kept up, and if entered in vacation, in most cases, they had relation back, and were entered of the prior term, and of the first day of such term, the execution on it usually was so tested. quence was that lands of a defendant were liable to be

<sup>(</sup>a) Black. Com. vol. 2, p. 161.

nded in the hands of a purchaser even though the rment did not actually exist at the time of the purse, if the judgment and writ related back to a time ecedent to the sale, viz., to the first day of the term. remedy this it was provided by 29 Car. 2, ch. 3, ss. 14 & Judgment to that the day of the month and year of signing judg-bind only from entry, nts be entered, and that as regards lands, they should and relation ly bind from the time of such entry as against bona day of term e purchasers for value, and not relate to the first day of taken away by eterm; and to facilitate searches for judgments, it was acted by 4 & 5 W. & M. ch. 20, that an alphabetical list 4 & 5 W. & M. the defendants' names should be kept by a docket docketing. reof, and that no judgment not docketed should affect y purchasers or mortgagees, or have any preference sinst heirs, executors, or administrators, in the administion of estates of their ancestors, or testators, or intes-The Statute of Charles was confined to purchasers, 1 did not apply as between the parties to the suit; and refore, if a defendant died in vacation, judgment might be entered as of the prior term when he was living. lit would be a good judgment; but by the effect of statute it would not, as against purchasers for value, relate back. Now however, by Rule of Court No. 47, Rule of Court judgments are to be entered of the day when signed, No. 47: judgments relate I have relation to no other day, unless by order. st be borne in mind that leasehold property, which is when signed. affected by the writ against lands, but only by that unst goods, was by the Statute of Charles, as regards chasers, bound only from the delivery to the sheriff of writ; as between the parties however and personal resentatives, it is bound from the teste (a), which is now day of issuing (b). The Statute of George 2, which Fi. fa. against es the writ of fieri facias against lands, places it on the footing as fi. le footing as the writ against goods; and therefore, it ta. goods by 5 been held that against purchasers, it binds not binds only n the judgment or the teste but from In this res- against purry to the sheriff to be executed.

It only to day

Geo. 2, and so the de- from delivery to sheriff as chasers.

<sup>8)</sup> See post p. 313, n. b.

<sup>(</sup>b) Con. St. c. 22, s. 249,

lien on lands.

pect it will be seen that its relation back was less than that of the writ of elegit, which referred to the docket-Judgment no ing the judgment. It may be taken as now settled (a). that a judgment is not a lien on lands either for the purposes of an elegit or otherwise.

Of the writ of elegit,

The writ of elegit was certainly introduced with the English law generally into Upper Canada. (b) Esten, V. C., seemed to consider that the case of Doed. Dempsey v. Boulton (c) decided that the writ of deait was not in force here: on reference to that case however, it will be seen that the language of the court was that "the Legislature knew that the process by elegit was never resorted to here, being considered to be superseded by the ft. fa. against lands under the 5 Geo. 2" In another case (d) wherein an elegit actually did issue, the right to issue it was not determined, though it was held that an elegit issued in March, 1827, could not relate back and prevail over a fi. fa. issued in May, 1826, under a conveyance was made by the sheriff in November, 1827. In a recent case (e) it is said it may be s question whether the writ of elegit may not be the proper remedy on a judgment against an heir on the debt of Admitting that an elegit will not relate his ancestor. back to the judgment for the purpose of binding lands, still it would seem to relate back to its teste, as the Statute of Frauds would not govern. Even a ft. fa. relates back to the teste, except by force of that statute \$8 against purchasers (f). The consequence would be that an elegit tested before, though not delivered to the sheriff till after a sale by the defendant, would override the sale

binds from the teste.

> The fi. fu. against lands binds in the same way as that against goods, and as it owes its existence to the Statute

<sup>(</sup>a) See 24 Vic. ch. 41, s. 10, and Gardner v. Juson, 2 Er. & App. R. 204; Doe d. McIntosh v. McDonell, 4 Q. B. O. S. 195; Doe d. Asip v. Hollister, 5 Q. B. O. S. 739.

<sup>(</sup>b) Bank of Montreal v. Thompson, 9 Grant, 51.

<sup>(</sup>c) 9 Q. B. U. C. 532.

<sup>(</sup>d) Doe d. Henderson v. Burtch, 2 Q. B. O. S. 514. (e) Rymall v. Ashberry, 12 C. P. U. C. 339. (f) See pp. 311, 313, n. b.

10. 2, before referred to, which declares that lands shall Fi. fa. binds ubject to the "like remedies process and proceedings" as against defendant, his ersonal estate to satisfy debts, it follows that the writ beirs or devinst lands binds in like manner as the writ against teste. ls, viz., by 29 Ch. 2, ch. 3, s. 16, as regards purchasers delivery to the sheriff, though as regards the defendhimself and his heirs from the teste (a). This latter t may be of importance if the defendant should die · the teste, but before delivery to the sheriff, in which the writ may still be proceeded on notwithstanding lands had passed by descent or devise (b). And if the and though ndant die on the same day, and before the writ issues, defendant die

rill still be valid and may be proceeded on, for the issues, if on ing the writ being a judicial act will be referred to the same day, riod of the day earlier than the death (c).

s between parties claiming to enforce their liens in binds in equity against the equitable interest of the debtor after ty from delivery as against utions issued, it has been held that the executions bind a subsequent take priority and the parties are entitled according to execution to creditor who take priority and the parties are to the sheriff, first files his bill to enforce not from the time that any one of them should first file the equitable ll to enforce the claim (d).

purchaser for value buying in good faith from the Purchase or devisee cannot be disturbed by a subsequent judg-from heir or devisee in t and execution founded on a simple contract debt of good faith ancestor (e).

good as against subse-

he difficulty seems to be, however, as to what is a quent execuhase in good faith. In Reid v. Miller, Parnall the tion. haser from the heir, appeared not to have had any ce of debts due from the ancestor, and though the ndant, who claimed through Parnall, or a mesne purer, may have had such notice, yet he was entitled to the

Ante p. 304, 311.

Doe d. Hagerman v. Strong, 4 Q. B. U. C. 510; Converse v. ie, 16 C. P. U. C. 167. (c) Converse v. Michie, supra.

Moore v. Clark, 11 Grant, 497. See post, p. 318, as to reaching able interests.

Reid v. Miller, 24 Q. B. U. C. 610; see Peck v. Buck, Cha. Chamlep. 294; Sug. Vendors, 13 ed. 540; Levisconte v. Dorland, 17 U. C. p. 437 40

benefit of the rule that a purchaser with notice claiming from or through a purchaser without notice, is protected. It is suggested that on purchase from the heir or devises, with notice of the insolvency of the ancestor or devisor it would be a wise precaution, beyond other evidence of good faith, such as the giving a not entirely inadequate price, to see that the purchase money be properly applied in payment of debts.

Interests not saleable under fi. fa. lands.

Rent seck. Rent charge.

The following interests in real estate are not liable to sale under the writ of fieri facias against lands. Lesseholds, they being personalty; the interest of a mortgages (b), he being quasi trustee for the mortgagor; a rent seck (c); and it has been doubted whether a rent charge with power of distress, secured on freehold estate can be sold under the writ: the statute Geo. 2. referring to houses, hereditaments, and real estate, &c., "situate and being in any of the said plantations," thus referring to something corporeal and visible, and which it was said did not in strictness include a rent charge on lands (d): such a rent charge is however extendible under an elegit even prior to the Imperial

to dower.

chase.

Vendor's interest.

Widow's right Act 1 & 2 Vic. ch. 110. A widow's right to dower before assignment has been held not to be saleable; but the Right of pur-right can be sold if the husband is alive (e). purchase cannot be sold, and though granted in a lease and exercisable by the lessee and his assigns and the lease be sold under execution the right to purchase will not pass (f). Whether the interest of a vendor is saleable when he has entered into a valid contract of sale or without such contract, is bound by a parol contract and part performance has been much questioned (g); it has been said he stands in the position of a mortgage whose interest is not saleable. Prior to the statute 12 Vic. ch. 73, the interest of a mortgagor in lands could not be

<sup>(</sup>a) Parke v. Riley, 12 Grant, 69; 3 Err. & App. 215, S. C.

<sup>(</sup>b) Doe dem. Campbell v. Thompson, Hil. 6 Vic.; R. & H. Digest, 202.

<sup>(</sup>c) Dougall v. Turnbull, 8 Q. B. U. C. 622.

<sup>(</sup>d) Dougall v. Turnbull, S. Q. B. U. C. 622. (e) See ante p. 69, n., c 74.

<sup>(</sup>f) Henrihan v. Gallaghe, ante 308 n. g.

<sup>(</sup>g) Parke v. Riley, 12 Grant, 69, 3 Err. & App., 215, S. C.

old; by that statute, however, all the legal and equitable nterest of a mortgagor may be taken in execution (a).

By the 10th section of the Statute of Frauds, the equitational sale and sale under execution; but it would seem that the trust if the trust are pure and estates saleable by virtue of that statute must be where the simple trusts, estate is held on a pure and simple trust, and not where the trust is of a special nature (b), and the statute does not extend to equitable estates in chattel interests (c).

It has been doubted in one case (d) whether a trust estate saleable is saleable at all in this country under a fi, fa. lands, and this doubt renders perhaps, the consideration of the question as to whether an elegit can issue, of more importance.

The alienable qualities under execution or by convey- Husband's, Ince from the party, at common law, and under Con. Stat.ch. wife's, mort-gagors and 0, ss. 5. 11, of the marital interest of a husband in the mortgagee's ands of his wife, of his interest as tenant by the curtesy, interests.

2), of a woman's right to dower (f), and of the estates and interests of mortgagors and mortgagees (g) have been refore considered.

The interest of a reversioner during the life of the tenant Reversions. Or life may be sold  $(h_n)$ 

A vested remainder was, even prior to the statute 14 & Remainders. 5 Vic. ch. 73 (i), allowing sales of future interests, saleable under execution (k).

Prior to this statute also, a right of entry was not sale-Rights of ble under execution; that is, where some person was in entry.

<sup>(</sup>a) See the mode and effect of sale fully considered, post, chapter on a ortgages.

<sup>(</sup>b) Simpson v. Smyth, 1 Err. & App. Rep. U. C. 44; Doe d. impson v. Privat. 5 Q. B. U. C. 215; see also Doe d. Jarvis v. Cumaing, 4 Q. B. U. C. 390; McLean v. Fisher, 14 Q. B. U. C. 617. Doe Hull v. Greenhill, 4 B. & Ald. 684; 2 Wms. Saund., 11 a. n. 17.

<sup>(</sup>c) Scott v. Scholey, 8. East, 467; 2 Wms. Saund., 11 a. n. l.; but see Doe d. Phillips v. Evans. 1 C. & M. 450, per Bayley, J.

<sup>(</sup>d) Doe d. Laurason, v. Canada Company, 6 Q. B. O. S. U. C. 428.

<sup>(</sup>e) Ante pp. 273, 70, 71, 69, n. c.

<sup>(</sup>f) Ante pp. 69, n. c. 70. (g). Post, chap. on Mortgages.

<sup>(</sup>h) Doe d. Cameron v. Robinson, 7 Q. B. U. C. 335.

<sup>(</sup>i) Con. Stat. ch. 90. (k) Lundy v. Maloney, 11 C. P. U. C. 143.

Rights of ntry.

possession of the land claiming the land as his own adversly to the true owner, the interest or right of entry of such dispossessed owner was not saleable under execution: this was on the principle that as the owner could not himself by deed or otherwise convey his interest, but must first gain possession (a), so neither could a transfer of such interest take place through the instrumentality of the sheriff (b). At common law also, contingent interests could not be ef-

Contingent interests.

fectually conveyed by deed, (c), though under circumstances they were upheld in equity (d); and not being capable of effectual conveyance by deed, they were not liable to exe-Binding effect cution, nor bound by any judgment. The inability of the

common law to reach by judgment and execution many

given by St. to judgments and execution species of interests, as rights of entry, contingent remainon various interests.

of judgments.

ders. &c., caused the interference of the Legislature, and 9 Vic. ch. 84, their action on this is as follows:—By statute 9 Vic. ch. 34 as to registry (e), judgments registered in pursuance of the act were to bind all the lands within the county in which registered in like manner as the docketing of judgments in England then bound lands; this was an unfortunate reference by the Legislature, because at that time the practice of docketing had been discontinued in England by statute for some time and no longer existed, being superseded by another mode In one case here it became necessary to decide what the Legislature meant, and whether lands were bound at all under the act by registry; and the court held they were, and that the statute must be read as though it were expressed that registry should bind in like manner as docketing, "when docketing was in force in England." Legislature by 13 & 14 Vic., ch. 63 (f) corrected the statute 9 Vic. ch. 34, by referring expressly to the effect of docket ing before it was discontinued.

13 & 14 Vic. ch. 63, Con. St. ch. 89.

> By these statutes therefore, lands could be bound by the effect of registry from the time of such registry, whilst theretofore (at law at least for the purpose of execution and

<sup>(</sup>b) Doe d. Ausman v. Minthorne, 3 Q. B. U. C. 423. (a) Ante. p. 73.

<sup>(</sup>c) Ante, p. 75.

<sup>(</sup>d) Ante, p. 76.

<sup>(</sup>e) Con. Stat. ch. 89, ss. 48, 49,

<sup>(</sup>f) Con. Stat. ch. 89, s. 49,

ing that the writ of elegit was not in force.) the lands only bound from the delivery of the writ of fi. fa. t lands to the sheriff, which could not take place till rn of the writ against goods. It was not only in reof the power to bind lands before the delivery of the o the sheriff that the statute 13 & 14 Vic. conferred fit, but that statute went beyond the statute 12 Vic. llowed the judgment the widest effect in binding species of interest of the judgment debtor, "over h he had any disposing power which he might, withthe assent of any other person, exercise for his own fit."

advantage creditors gained by these statutes may be Advantage of by reference to one or two cases. As before mentioned, to creditors. are many interests not bound by an execution, which bound by registry of the judgment (a); it has been that the interests of a mortgagee, and of a cestui que (unless in case of a pure and simple trust.) were not , and could not in any way be reached at law; so also Exercise of state were limited to a man and his heirs to such uses power of appointment should appoint, and in default of, and till such ap-may defeat nent to him in fee, such an interest might not be sale-executions. inder execution, because the subsequent exercise of ower of appointment in fee would override the tion; the appointee being deemed to take, not from pointor under the appointment as from that time, but the original conveyance, as though he were a party nom the use in fee was by it originally limited (b). interests and power however, would have been bound the statute 13 & 14 Vic. That act was copied from ip. Act 1 & 2 Vic. ch. 110. It will be observed it gave urts of common law no greater scope than they had : an interest not saleable under execution before the e was not saleable after it, though bound, and the was to proceed in equity on the lien.

<sup>&#</sup>x27;errie v. Kelly, 9 Grant, 262.

ee ante p. 233; Wms. Rl. Prop. 8 ed. p. 255; Doe d. Wigan v. 0 B. & C. 459.

authorizes ests. &c.

It was by the statute 12 Vic. ch. 71 that the common law courts got extended powers under executions. Con. Stat. ch. statute however, was in its main provisions repealed by 90, ss. 5, 11, 14 & 15 Vic. ch. 7, under which "a contingent, an execusale of rights tory, and a future interest, and a possibility coupled with of entry, contingent interest in any land, whether the object of the gift or limitation be or be not ascertained, also a right of entry whether immediate or future, vested or contingent, may be disposed of by deed;" and are liable to seizure and sale under execution. The effect of the provisions of these statutes, consolidated by ch. 90, ss. 5, 11, have been before considered, and the interests that are saleable thereunder (a).

Effect of judgment as a lien abolished by

The power to bind lands by registry of the judgment's taken away by 24 Vic. ch. 41. In England such power 24 Vic. ch. 41. still continues, but when in English cases and books registry of a judgment is referred to, it is not registry in a county registry office, but registry as named in the Imperial Act in the Court of Common Pleas. The result of taking away the power to bind such interest in lands of a judgment debtor over which he has any disposing power which he could exercise of his own sole authority is that there are, as above mentioned, many interests in lands which are not bound at all by a judgment, nor except so far as the Stat. 14 & 15 Vic., Con. Stat. ch. 90, extends can they be reached at law, at least under an execution

Equitable interests may be reached in equity.

In equity, however, after execution issued, many interests which cannot be reached at law can be made available to satisfy the judgment creditor (b). Proceedings however must be taken in equity during the currency of the wit (v): though if a decree be obtained during the currency the subsequent lapse of the writ will not prejudice (d)-

<sup>(</sup>a) Ante p. 65.

<sup>(</sup>b) Neate v. Duke of Marlborough, 3 M. & C. 407; Bank B.N. America v. Matthews, 8 Grant, 486; Moore v. Clark, 11 Grant, 497; Toms v. Peck, 12 Grant, 345; Yale v. Totterton, 13 Grant, 302; Wisson v. Proudfoot, 15 Grant, 103; Gilbert v. Jarvis now in appeal; and Horsley v. Cox, L. R. 4 Cha. App. 92.

<sup>(</sup>c) Wilson v. Proudfoot, supra.

<sup>(</sup>d) Yale v. Totterton, sept.

between parties seeking to enforce their claims in nity on executions issued affecting the equitable inest of the defendant, the executions bind and take ority according to their delivery to the sheriff, and not ording to the time that any one of them should first a bill to enforce the lien (a). It was before mentionthat probably the interest of a cestui que trust if of a re and simple nature is saleable at law under the State of Frauds, except in chattels (b).

a) Moore v. Clark, 11 (frant, 497, supra. (b) Ante. p. 315.

here are certain questions which have been much agitated in our Relation of res, and on which there has been much conflict of authority; they execution to yet of importance on investigation of titles, but as by lapse of time, registered to registry of judgment has been abolished, they have not the im-judgment, tance they heretofore had, the result of the cases will be only stated priority, &c. governed by the Statutes 14 & 15 Vic. and 24 Vic.: 1st. A writ rea back to the registry of the judgment on which it was founded, so to avoid an intermediate execution or conveyance by the execution wor, and that before and after the Stat. 24 Vic. ch. 41 (Doe v. Fang, 8 Q. B. U. C. 166; Doe d. Dempsey v. Boulton, 9 Q. B. U. C. 532; at of Montreal v. Thompson, 9 Grant 51, 3 Err. & App. Rep. 239 C.) 2nd. If such writ was not delivered to the sheriff within a year m entry of the judgment, it could not relate back as against ther execution first delivered to the sheriff; and it makes no erence in this whether the last named execution was or was not on egistered judgment, or whether being on a registered judgment, it or was not delivered to the sheriff within a year from entry, and was so both before and after the Stat. 24 Vic. (Rowe v. Jarvis, 13 P. U. C., 495, and cases there cited; Moffatt v. March, 3 Grant, overruled). 3rd. An execution on an unregistered judgment will take rity over a prior registered judgment, if no execution on the registered ment have been delivered to the sheriff within a year from entry of judgment; that is, a sale under the execution will not be subject to the itable charge created by the prior registered judgment (Kerr v. Ams-2 Err. & App. Rep. 446). 4th. That for writs to relate back to stry, they must by Stat. 24 Vic. have issued prior to 1st September, 1. 5th. That statute gives to a registered judgment no greater acy or binding effect if theretofore prejudiced in any way, as by abce of re-registry within three years prior to the passing of the act, reglect to deliver the writ within a year, than it had before. 6th. The ute gave to no writ any greater efficacy than it had before: thus, if interest bound by the registry of judgment were an equitable, or other rest, as a mortgagee's, which could only be reached in equity and as law under execution, the remedy of the plaintiff was still only in ity: and so far as regarded the giving priority of writs according be respective times of registry of the judgments, it would seem that law before the act. 7th. Registry of a judgment against personal resentatives did not bind the lands of the deceased (Hamilton v.

How and when How and when the fieri facias against lands may issue, the writ can issue, and the and the effect of the irregularities in the mode of proceediest of irreduced has now to be considered.

Two statutes since the Con. Stat. bear on the subject, and it will be convenient to treat of them, and the decisions under them in their order.

Con. St. ch. 22, s. 252.

sale under it.

By Con. Stat. ch. 22, s. 252, goods and lands were not to be included in the same writ, nor could execution issue against lands till the return of a writ against goods, nor could the sheriff expose the lands to sale within less than twelve months from the day on which the writ was delivered to him. It was probably intended by the Stat. 5. Geo. 2. that lands and goods should be included in one writ (s): but not only was that forbidden by the Con. Stat., but the issuing and delivery to the sheriff of an alias writ against goods, and a concurrent writ against lands was held to be irregular; but it would seem that if neither had been acted on, either could probably be abandoned to support proceedings under the other (b): if, however, either have been acted on, then as against the defendant without his consent, and as against third parties claiming against the other wit, the proceedings had under the one writ cannot be abandoned, so as to support subsequent proceedings under the other writ (c). It would seem that third persons having an interest in the property, and being prejudiced

<sup>(</sup>a) Per A Wilson, J., Ontario Bank v. Kerby, 16 C. P. U. C. 42.
(b) Ontario Bank v. Kerby, supra; see also cases next note.

<sup>(</sup>c) Paton v. Ontario Bank, 12 Grant 366, 13 Grant 107; Ontario Bank v. Kerby, supra; but see Ontario Bank v. Muirhead, 24 Q. B. U. C. 563.

Beardmore, 7 Grant, 286; Bank of Montreal v. Taylor, 15 C. P. U. C. 107). There remains yet for consideration the case of contest between an execution creditor on a registered judgment, and a purchaser from the execution debtor. Judgments by 9th Vic. ch. 34, were made to bind lands of a judgment debtor from registry, and if after registry the debtar conveyed, the grantee took subject to the judgment; but this act gave no priority to a judgment over a conveyance (though unregistered) from the debtor, prior to the judgment: this was done by 13 & 14 Vic. ch. 63, Con. Stat., ch. 89, s. 53, by which a conveyance prior to the judgment is declared void against the judgment, if registered before the every evenue. The statute, it has been held, only applies to render void, every evenues prior to the judgment, not those subsequent, even the judgment were first registered (Thirkell v. Patterson, 18 Q. T. U. C. 75).

e irregular proceedings, can apply against the writ on 1 they are had, as for instance, a purchaser or mortgate. As a general rule also a seizure is a satisfaction anto (b).

ss. 5 and 6, of 29 & 30 Vic. ch. 42, no execution 29 & 30 Vic. st lands could issue to any sheriff till after a return of ch. 42, ss. 5; bona by the same sheriff, nor could he make any return till the whole of the goods in his county were isted, and the return was to be in the order of priority hich writs came into his hands. The latter part of enactment placed both the sheriff and a second executreditors desiring a return with a view to proceed st lands in a very difficult position, when the first ition creditor insisted on his right to renew and to no return (c).

2. 252 of the Con. Stat., and ss. 5 and 6 of 29 & 30 ch. 42. were repealed by 31 Vic. ch. 25, which is as vs:—

## 31 VIC. CH. 25.

# An Act as to Executions against Goods and Lands.

### Assented to 4th March, 1868.

nereas, by an Act passed in the session of Parliament Preamble. in the twenty-ninth and thirtieth years of Her Majesty's chapter forty-two, intituled "An Act to amend the Comaw Procedure Act of Upper Canada," the principle is recogof allowing persons who have priority executions in regard to, to retain the same in regard to lands; but difficulties exist plying the said Act by reason of its enactment that the f shall return writs against goods only in the order of pri-

Paton v. Ontario Bank, 13 Grant, 107, 12 Grant, 366, s. c.; Ontario r. Kerby, 16 C. P. U. C. 40, per A. Wilson, J.; but see also Ontario r. Muirhead, 24 Q. B. U. C. 563.

Chit. Arch. P. 12th ed. 681.

Gleason v. Gleason, 4 Prac. Rep. 117.

ority in which they come to his hands, whilst, nevertheless, a nerson having a first execution against goods is entitled to renew the same indefinitely without any return thereof: Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of Ontario, enacts as follows:

29 & 30 Vic. 6, and s. 252, C. L. P. Act repealed.

1. Sections five and six of the said Act, and the two hundred ch. 42, ss. 5 & and fifty-second section of the Common Law Procedure Act, are hereby repealed and the following substituted therefor:

Lands may issue at same

"Any person who now is or hereafter may become entitled Writs against to issue a writ of execution against goods and chattels may at or after the time of issuing the same, issue a writ of execution time as writs against the lands and tenements of the person liable, and deliver against goods. the same to the Sheriff to whom the writ against goods is directed, at or after the time of delivery to him of the writ against goods, and either before or after any return thereof: Provided. lands not to always, that the Sheriff shall not expose the lands for sale, or sell within less than twelve months from the day on which the writ against the lands is delivered to him."

Proviso: be sold within a year.

No sale of turn of nulla hona against goods.

2. No sale shall be had under any execution against lands lands until re- until after a return of nulla bona, in whole or in part, with respect to an execution against goods in the same suit or matter by the same Sheriff.

When nulla returned.

3. No Sheriff shall make any return of nulla bona, either in bona not to be whole or in part, to any writ against goods until the whole of the goods of the execution debtor in his county have been exhausted.

If the debt is realized under writ against penses allowed against lands.

4. If the amount authorized to be made and levied under the writ against goods be made and levied thereunder, the person goods, no ex- issuing the writagainst lands shall not be entitled to the expense thereof, or of any seizure or advertisement thereunder; and the return to be made by the Sheriff to the writ against lands shal . be to the effect that the amount has been so made, and levied, aforesaid.

Writs to have same binding effect as heretofore.

5. The said writs against lands and goods shall have the sam.  $-\!\!\!\!\!$ operation and binding effect as heretofore, and the law applicable heretofore on executions shall continue applicable, except so as variance is requisite, by reason of the enactments hereof.

It has been held under the old practice when writs were Proviso to s. 1. returnable on a day certain that an alias fi. fa. need not

we a year between the teste and the return day (a); and Cases wherein Frefore under the present practice, where the fi. fa. has need not en twelve months in the sheriff's hands, he can sell under elapse before alias writ, without waiting for the expiry of a further sale. rn of twelve months (b). Although this decision was or to the Act of 31 Vic., it is apprehended that act makes change, the language being the same as in the former , with an inmaterial exception. It would seem also that ands be acquired by a defendant pending the writ, sale be had of them within less than twelve months from juisition, if the time required for due advertisement be  $\supset$  wed (c).

As regards sec. 3 of 31 Vic. ch. 25, the law was much Section 8. that effect under the Con. Stat. even (d). Any person Whomay comwould seem, who is interested in the lands and preju-plain of noned by non-compliance with this section, as for instance with. purchaser or mortgagee, might apply against a fi. fa. ids irregular by reason of non-compliance with this tion (e). It is apprehended however, that non-com- Effect of false ance with it would be a mere irregularity, and also that return of nulls return of nulla bona though false, were bona tide bout knowledge by the sheriff or the execution creditor there being any goods, and after reasonable enquiries le, that such return would sufficiently comply with the it of this section (f). Moreover this section as regards effect on sec. 2, would appear to be merely directory. 'he sheriff cannot under the writ, dispossess the occu- Sheriff cannot t (g), and therefore the purchaser may have to bring eject-dispossess defendant. It to gain possession. In such an action, if it be against the indant in the original suit, or any one claiming under On ejectment by purchaser,

t, subsequent to the delivery of the writ, the purchaser, proof rea though he were the execution creditor, need not prove quired.

<sup>1)</sup> Nickall v. Crawford, Taylor's Repts. U. C. 277.

Campbell v. Delihanty, 24 Q. B. U. C. 236.

<sup>)</sup> Ruttan v. Levisconte, 16 Q. B. U. C. 495.

<sup>&#</sup>x27;) Ontario Bank v. Kerby, 16 C. P. U. C. 35; Ontario Bank v. head, 24 Q. B. U. C. 563. (e) See p. 321, n. a.

Ontario Bank v. Kerby, same v. Muirhead, supra

<sup>)</sup> Doe d. Tiffany v. Miller, 10 Q. B. U. C. per Burns J., pp. 80, 81; p. 308.

In ejectment by purchaser, proof required.

How far irregularities affect a purchaser. the judgment under which the writ issued (a); nor it would seem, the proceedings requisite to the validity of the issuing the writ, as that the fi. fa. goods issued within a vear, or that it was returned "No goods" (b); but if the defendant in the ejectment be a stranger, not claiming under or in privity with the execution defendant, then the judgment must be shewn, and the issuing and return of the wit against goods (c). Even though the judgment or the write when produced should be irregular, or appear to be improperly issued, and such as would have been set aside on proper motion for that purpose, still it would not follow that therefore a purchaser would lose the benefit of his purchase; in many cases the purchase has been upheld under irregular proceedings, where the writ under which the sale took place was valid on its face, and the prior proceedings, or the absence of them, not such as to make the writ absolutely void (d): but in one case, Sir J. Robinson, C.J. observed, "there may be defects in a title under a sheriff's sale which when proved would not be fatal to the title, if a stranger had been the purchaser, but which could be urged with success against the plaintiff in the ti. fu. if he became the purchaser, because the irregularities might be such as he could be clearly held responsible for" (e): this distinction however, did not prevail in a recent case (f)wherein the purchaser was both execution creditor and attorney for a co-plaintiff, but the dictum of the learned Chief Justice was not referred to in that case.

<sup>(</sup>a) See generally Roe v. McNeill, 13 C. P. U. C. 189; remarked on 14 C. P. U. C. 424 S. C. See also Ralston v. Hughson, 17 C. P. U. C. 364.

 <sup>(</sup>b) Delisle v. Dewit, 18 Q. B. U. C. 155; Douglass v. Bradford, 3 C.
 P. U. C. 459; Mitchell v. Greenwood, 3 C. P. U. C. 465.

<sup>(</sup>c) Perry v. Piquott, 12 Q. B. U. C. 372; McDonell v. McDonell, 9 Q. B. U. C. 259.

<sup>(</sup>d) Doe d. Boulton v. Fergusson, 5 Q. B. U. C. 515; Doe d. Meyers v. Meyers, 9 Q. B. U. C. 465; Doe d. Spafford v. Brown, 3 Q. B. U. C. O. S. 90; Doe d. Hagerman v. Strong, 4 Q. B. U. C. 510; Ontario Bank v. Kerby, 16 C. P. U. C. 35; 24 Q. B. U. C. 563; Fields v. Livingston, 17 C. P. U. C. 15; Paterson v. Todd, 24 Q. B. U. C. 296, in which cases see also what are irregularities.

<sup>(</sup>e) Delisle v. Dewitt, 18 Q. B. U. C. 158.

<sup>(</sup>f) Paterson v. Todd, 24 Q. B. U. C. 301.

Imendment of merely irregular proceedings can be had, Amendment. n after error brought, on sale and conveyance by the riff(a).

Is regards those proceedings within the cognizance of Recitals in sheriff, as the time of delivery of the writ to him, the Sheriff's deed aire, and sale, the statement in his deed, of conveyance evidence of the purchaser in relation to such matters is primu facie term. dence (b): but a misrecital in the conveyance as to facts. ich if they had happened only as recited, would invalie the sale, does not necessarily preclude the grantee from wing the truth, and from supporting the sale by evidence trary to the deed: thus, where the sheriff mis-recited t by a ven ex he had seized, it was held that evidence tht be given that in fact the scizure was made under the or fi fa (c).

Renewal of writs under sec. 249 of the C. L. P. Act could Renewal. v take place once (d). This was remedied by sec. 2 of Vic. ch. 13, which is prospective only in its effect, at 27 Vic. ch. 13, A lapse of fifteen days <sup>8 2</sup>. st as regards that section (e). ween the receipt of the writ by the attorney for the pure of renewal, and its re-delivery to the sheriff renewed. been held not to amount to an abandonment of prior ht under the writ, though a year had expired between : issuing the writ and the re-delivery to the sheriff after tewal(f).

Expiry of the writ takes place on the day next after Expiry. at of issuing in the ensuing year (g).

If nothing be done by way of seizure or advertisement Seizure bering the currency of the writ, a sale under it will be fore, warrants sale after exid (h), but if the sheriff have commenced the execution piry.

a) Doe d. Elmsley v. McKenzie, 9 Q. B. U. C. 559; Helm v. Cros-, 17 C. P. U. C. 156. Con. St. ch. 22, s. 222, C. L. P. Act. Ch. Arch. . 12 ed. p. 642. (b) Mitchell v. Greenwood, 3 C. P. U. C. 465.

<sup>(</sup>c) Roe v. McNeil 14 C. P. U. C. 424.

<sup>(</sup>d) Miller v. Beaver Association, 14 C. P. U. C. 399.

<sup>(</sup>e) Miller v. Beaver Association, supra.

<sup>(</sup>f) Meneilly v. McKenzie, 3 Err. & App. Rep. 209.

<sup>(</sup>g) Bank of Montreal v. Taylor, 15 C. P. U. C. 107.

<sup>(</sup>h) Doe d. Greenshields v. Garrow, 5 Q. B. U. C. 237; Gardiner v. son, 2 Err. & 2 App. Rep. 188.

Ven ex., when of the writ during its currency, as by advertisement, even though only under another writ, then a sale may be had under it after it has expired (a); nor is there any necessity in such case for a ven ex, which is only requisite to compel the sheriff to sell, and as his warrant for so doing, for he would not be justified to in selling under a fi fa at a great specifice.

Seizure, what An advertisement in the Gazette or seizure under one wit is a seizure under all writs then in the sheriff's hands (b).

What constitutes a seizure or inception of execution apart from advertising in the Gazette is by no means clear, especially since a recent decision (c). It had been considered that the fact of the sheriff going to the defendant (then residing on the lands in question) and asking him for a list of the lands to be sold under execution, and receiving the information which did not include the lands in question, which the sheriff was aware belonged to the defendant, and which be afterwards off the land added to the list himself. was suffcient before the C. L. P. Act (d). In those cases also are dicta that an advertisement or other acts would be sufficient and if that be law which was so considered in those cases. then on principle, and in reason it would seem that an advertisement in a local paper only would be sufficient, as being an act of greater notoriety than what was deemed sufficient in those cases, or than an advertisement in the Gazette. It is somewhat remarkable therefor that it should have been held that an advertisement in a local paper was not sufficient (e), and that such decision should have been based on a case (f) as having decided the question, which would appear to have decided merely that

<sup>(</sup>a) Doe d. Campbell v. Hamilton, E. T., 3 Vic. R. & H. Dig. 403; Campbell v. Clench, 1 Q. B. U. C. 267; Doe d. Miller v. Tiffany, 5 Q.B. U. C. 79; Doe d. Tiffany v. Millar, 10 Q. B. U. C. 65; Rowe v. Jarri, 13 C. P. U. C. 495; Hall v. Goslee, 15 C. P. U. C. 101.

 <sup>(</sup>b) Hall v. Goslee, supra.
 (c) Hazlitt v. Hall, 24 Q. B. U. C. 484.
 (d) Doe d. Miller v. Tiffany; Doe d. Tiffany v. Miller. supra, 6 Q. B.
 U. C. 426, S. C.; see also, Douglass v. Bradford, 3 C. P. U. C. 459.

<sup>(</sup>c) Hazlitt v. Hall, supra.

<sup>(</sup>f) Bank of Montreal v. Munro, 23 Q. B. U. C. 414.

stayed writ had lost priority. The C. L. P. Act, Con. Con. Stat. c. at. ch. 22, s. 268, does not enact that what was suffi22, s. 268, as to seizure.

In the control of the act should not be sufficient thereafter, or that advertisements in the Gazette should alone be sufient; it provides by sec. 268:

268. The advertisement in the Official Gazette of any lands for le under a Writ of Execution, during the currency of the Writ, ving some reasonable definite description of the land in such vertisement) shall be deemed a sufficient commencement of the ecution to enable the same to be completed by a sale and convance of the lands after the Writ has become returnable. 19 c. 43. s. 188.

Since the decision above referred to it may be doubtful ether an actual taking and continuing of possession, or ything short of advertisement in the Gazette would suf-

By sec. 269, if a sheriff vacate his office before sale, his sec. 269, sherecessor is to proceed on the writ, but if after sale, then office. old sheriff may execute a conveyance of any lands sold him while in office (a). Prior to this enactment, if a wriff had commenced the execution of a writ, as by zure or advertisement, and then gone out of office, he ald notwithstanding have proceeded to a sale, and have ecuted the conveyance to the purchaser, and this even bugh he might have left office for some time (b).

A sale by the sheriff is within the Statute of Frauds, Sale within d therefore a conveyance is requisite as required by Frauds, at statute, and it should be under the hand and seal office of the sheriff (c).

So also a conveyance from the sheriff, was within the and Registry nsolidated Registry Act, and could by priority of re-

<sup>(</sup>a) Miller v. Stitt, 17 C. P. U. C. 559.

<sup>16)</sup> Per Draper, J., in Burnham v. Daly, 11 Q. B. U. C. 211; Cample v. Clench, 1 Q. B. U. C. 267; Doe d. Campbell v. Hamilton, E. T. Vic., R. & H. Dig. 403.

c) Per Burns, J., Doe d. Tiffany v. Miller, 10 Q. B. U. C. 81; Witham Smith, 5 Grant 203; Doe d. Hughes v. Jones, 9 M. & W. 372; Mingaye Corbett, 14 C. P. U. C. 557.

within Registry Act.

Sheriff's sale gistry both defeat a prior conveyance unregistered, and be defeated by a subsequent conveyance first registered. thus, under the former Consolidated Registry Act. if a person should have bought from another, and have omitted to register the conveyance, and the land should have been sold to a bong fide purchaser under an execution against the vendor, and such purchaser should have registered the conveyance from the sheriff, he would gain priority over the former unregistered conveyance (a). Should the purchaser from the sheriff have omitted to register the conveyance to him, and the execution debtor conveved to another after the execution of the conveyance from the sheriff, such latter conveyance would have been postponed, if the person buying from the execution debtor first registered (b): but it would seem that if such latter convevance were before the execution of the deed from the sheriff, and after the delivery of the writ, it would not, though registered first, have taken priority over the sheriff's deed: thus in one case a purchaser bought at sheriff's sale under execution, in 1843, but the sheriff did not execute the conveyance till 1853: in 1852 the execution debtor conveyed to a second purchaser, who registered, and insisted on priority under the Registry Act: but it was held that the act did not apply in such case to enable a purchaser who became such after the sale by the sheriff, and before the conveyance from him to defeat such conveyance or sale, that the lapse of a day between the sale and conveyance would not enable a purchaser from the debtor to defeat the sheriff's sale, so neither would a lapse of ten years; the sheriff's deed related back, and the wording of the Registry Act was referred to, as enabling subsequent deeds to defeat prior deeds, not prior deeds to defeat subsequent ones, which latter was what the purchaser was contending for (c).

<sup>(</sup>a) Doe d. Brennan v. O'Neill, 4 Q. B. U. C. 8; Waters v. Shade, 2 Grant, 457; Doe d. Hughes v. Jones, 9 M. & W. 377, per Alderson, B; Thirkell v. Paterson, 18 Q. B. U. C. 75.

<sup>(</sup>b) Per Draper, C. J., Bruyers v. Knox, 8 C. P. U. C. 524: Doe d. Hughes v. Jones, 9 M. & W. 377, per Alderson, B.

<sup>(</sup>c) Burnham v. Daly, 11 Q. B. U. C. 211.

ms of the present Registry Act on the subject, h. 20, ss. 58, 59, are as follows:

erv deed made by a sheriff or other officer for arrears of l be registered within eighteen months after the sale eriff or other officer; and all deeds of lands sold under Conveyance ued from any of the courts of law or equity in Ontario, on sale under gistered within six months after the sale of such lands, be registered the parties respectively claiming under any of such sales, within six months from be deemed to have preserved their priority as against a sale. in good faith who may have registered his deed prior to ation of such deed from the sheriff or other officer.

deeds for lands sold for taxes, or under process of law, if sale before passing of this act, shall be registered within one year registered passing of this act, otherwise the parties respectively within a year nder any such sales shall not be deemed to have preir priority as against a purchaser in good faith who may ired priority of registration.

haser having notice of a prior sale would not, it Purchaser ended, be a purchaser in good faith within the with notice of these sections, and thus the first unregistered the act. would not require the aid of a court of equity to gainst the registered conveyance.

to the act of 13 & 14 Vic. ch. 63, an unregistered Sec. 59, does ice was not liable to be defeated by a registered it apply, if the nce unless the title were a registered title (a); the old law unregistered conveyance from the sheriff would defeated? re that act have been defeated by a subsequent ice from the former owner first registered, unless aveyance of the land had theretofore been on Section 59 has no express exception in it to

certain circumstances, as misconduct of the sheriff Sale and cona sale and conveyance by him may be set aside veyance by Sheriffmay be tever power a court of common law might have set aside.

law as it stood prior to 13 & 14 Vic.

till v. McGlashan, 6 Grant, 324.

y v. Jordan, 5 Grant 467.

vevance may be set aside.

Sale and con- in such a case (a), still relief can be had more completely in equity (b): a court of common law from which the execution has issued has power at least to stay the conveyance after sale; but on motion for such purpose, the purchaser as well as the sheriff should be called on to shew cause. In many cases wherein the sheriff and execution credity has shewn a disregard of the interest of the defendant whose estate has consequently been sold at a sacrifice, courts of equity have interfered. Where the sheriff offered for sale the interest of the debtor in certain lands, whatever it might be, not stating what it was, although the means for ascertaining were convenient, and it was actually known to the execution creditor and partially known to the sheriff. the sale which was at an under value was set aside (c). A court of equity will also decline its assistance, as against fraudulent conveyances, in support of the claim of an execution creditor, a purchaser at sheriff's sale at much less than the value, though the price was lessened by the execution defendant having made the conveyance to defeat the the execution, and by its being oustanding; the proper course being for the creditor to apply to the court before sale (d). But in such case the sheriffs deed is not void, and the estate would pass at law (e).

> Where land is sold under a ven. ex. mere inadequacy of price is not sufficient ground to avoid the sale (f).

Effect of staytion.

If on or after the delivery of the writ to the sheriff, he ing the execu- be instructed to wait, or not to proceed till another wit should come to his hands, then the writ is not deemed sin

<sup>(</sup>a) See Bank U. C. v. Miller, Hil. Term 3 Vic., R. & H. Dig. 404; McGillis v. McDonald, Easter Term, 3 Vic., R. & H. Dig. 404; Behane v. Corbett, 18 Q. B. U. C. 511, 514, per Robinson, C. J.

(b) McGill v. McGlashan, 6 Grant, 324; Campbell v. Smith, 10 Grant, 324;

<sup>(</sup>c) Fitzgibbon v. Duggan, 11 Grant, 188. See also Jones v. Joses, 15 Grant, 40; Bebee v. Beglar, 6 More Indian appeals, 510; Palmer's cont 4 Rep. 74, and remarks in the chapter on mortgages as to sale of equities of redemption by the sheriff, and McDonald v. Cameron, 13 Grant, 84, in which latter case the whole matter of a sheriff's duty on sale is considered.

<sup>(</sup>d) Kerr v. Bain, 11 Grant, 423; Chalmers v. Piggott, 11 Grant, 475; Wilson v. Shier, 6 Grant, 630; Malloch v. Plunkett, 9 Grant, 556.

(e) Per Esten, V. C., Malloch v. Plunkett, supra.

(f) Laing v. Matthews, 14 Grant, 36.

he sheriff's hands to be executed, and is liable to be postoned to any subsequent writ delivered to him (a).

So also great delay unexplained in execution of a writ Delay in exewhich might have been executed is evidence from which a outing. ury may infer a stay, or a fraudulent connivance with the lefendant sufficient to postpone the writ to one subsequent b). A delay however, of fifteen days in re-delivery to the heriff of a writ taken to be renewed will not be sufficient o postpone the writ, though before re-delivery a year has expired from the issuing (c).

There is a very general impression, among sheriff's at Sheriff's duty east, that no duty is cast on them by law on delivery of a to make inquiries for lands. vrit against lands, to make any inquiries or ascertain what ands are liable to satisfy the writ; and that at any rate hey can relieve themselves from any responsibility in that espect by asking the creditor or his attorney to point out inds. It is conceived that such is not the law; on the ontrary, it has been decided that sheriffs are not relieved om making reasonable enquiries, and that "if sufficient vidence is given to shew that the sheriff had notice, though ot coming from the execution creditor, that the debtor ad lands liable to be taken in execution, or even to put him n enquiry, when by reasonable diligence he might ascerain the same fact, that the plaintiff has done enough to ustain that part of his case" on an action by him against he sheriff for not levying, and a false return of 'no lands' (d).

Writ of extent at suit of the Crown. Prior to 14 & 15 Prior to Con. 7 ic. ch. 9, Con. Stat. ch. 5, debts by bond to the Crown, if Stat. ch. 5, landsof Crown aken pursuant to 33 Hen. 8, ch. 39, bound the lands of the (bond) debtebtor, from the time of the instrument: thus, if a bond from date of rere given to the Crown, to secure the faithful performance the bond. f an office, the lands were bound from the date of the bond. ven though no default should happen till many years

(a) Foster v. Smith, 13 Q. B. U. C. 243; Bank v. Munro, 23 Q. B. U.

<sup>. 414;</sup> Trust and Loan Co. v. Cuthbert, 13 Grant, 412. (b) Kerr et al. v. Kinsey, 15 C. P. U. C. 531.

<sup>(</sup>c) Meneilly v. McKenzie 3 Err. & App. Rep. 209.

d Hutchings v. Ruttan, 6 C, P. U. C. 452.

afterwards, and though the debtor had aliened his lands to a purchaser before default.

Simple contract debts, &c.

Simple contract debts, and specialty debts not within the Statute of Hen. 8, do not seem to have bound the debtor's lands at common law, before they were recorded on a commission for that purpose, unless they were due from known public officers and accountants of the Crown, in which case they seem to have always bound the lands from the time the debt accrued. By the Stat. 13 Eliz. ch. 4. all lands which the class of persons therein named should have whilst they remained accountable to the Crown were bound from the time they first entered office or became accountable, and not merely from the time when the debt should acrue w the Crown, provided their receipts exceeded three hundred Personal estate, including chattels real pounds sterling. was as against bona fide purchasers bound however only from commencement of process, both as to Crown accountants and specialty debtors (a). In case therefore, of debtors on bond to the Crown, as also of that class of per-

sons within the Statute of Elizabeth, if they should, after the obligation in the one case, or after entering office or becoming accountable in the other, alien their lands, and twenty years should elapse during which the lands should have gone through many hands, and then default should be made to the Crown in accounting or otherwise, the Crown can avoid all mesne conveyances and incumbrances by the

By 18 Eliz. ch. 4, lands of Crown accountants bound.

Personalty.

There were frequently great difficulties in ascertaining whether a vendor was in the position of having his lands bound to the Crown, and therefore by Stat. 14 & 15 Vic. ch. 9, Con. Stat. ch. 5, it was enacted as follows:

process of extent (b).

<sup>(</sup>a) 8. Rep. 171.

<sup>.</sup> b: As to Crown debta see 5 Jarm. Convey. by Sweet, pp. 64 f. ??; Butler Co. Litt. 209 a. 18 ed; Shelford State. 7 ed. 596 note; Wester extent.

#### CON. STAT. CH. 5.

ACT RESPECTING THE REGISTRATION OF DEEDS AND INSTRUMENTS CREATING DEBTS TO THE CROWN.

r Majesty, by and with the advice and consent of the By Con. Stat. lative Council and Assembly of Canada, enacts as follows: ch 5, special-No deed, bond, contract or instrument, under seal, or of only from l, whereby any debt, obligation or duty is incurred or created registry in Q. B. er Majesty, shall be valid or sufficient to charge or effect ands or any interest in lands, of the person executing the or effected thereby, as against, any subsequent purchaser or ragee for valuable consideration of the same lands from such n, or against any subsequent registered judgment on the lands against such person, unless a copy of such deed, bond, act or other instrument, certified by the proper Officer having ustody of the same, had been registered in the office of the of the Court of Queen's Bench in Toronto, before the execuof the deed, conveyance or agreement of such subsequent user or mortagee, or the registry of such subsequent judg-14, 15 V. c. 9, s. 1.

Upon production to such Clerk of a copy of any such deed, How regiscontract or other instrument so certified as aforesaid, he tered, and enter and register the same in a book to be kept by him for purpose, and after such registry all the lands of the person uting such deed, bond, contract or other instrument, shall be 1 and charged thereby. 14, 15 V. c. 9, s. 2.

The Governor in Council may order that all or any lands The Governor I by such deed, bond, contract or other instrument, shall be may release. ed from the charge created thereby, and upon the production the order certified by the President or Clerk of the Executive cil, the Clerk of the Court of Queen's Bench shall enter egister the same in the said book as a release of the lands ioned in the order, whereupon the lands shall be released dingly. 14, 15 V. c. 9, s. 3.

The Clerk of the Court of Queen's Bench shall be entitled mand from the person producing the same for registry, the of One Dollar, to be paid to the fee fund in the same mans other fees are paid to such fund. 14, 15 V. c. 9, s. 4.

the act speaks of registered judgment creditors, and Judgments gistration of judgments is now abolished, and a mere not within s.1

judgment is no lien on lands (a), it would seem that in favor of the Crown, the first section at least will not apply for the benefit of judgment creditors.

How far unrebind the oblipurchasers under execution.

Another question may also arise under sec. 2, viz, gistered bonds whether an unregistered instrument has any binding effect gor, his heirs even against the debtor and his heirs or devisees, or persons and devisees, claiming under or through him as volunteers or purchases volunteers or purchases under execution. The original act may be looked at w guide in the construction of the statute which consolidates it (b), but if there be a variance between the two the latter will prevail (c). The title of the original act is "An act to compel the registration of deeds and instruments creating debts to the Crown;" the preamble is, "whereas it is desirable that all deeds and instruments under seel or of record, whereby any debt, duty or obligation has been or may be created to Her Majesty or her successors shall be registered in manner hereafter provided, in order to bind the land of the parties executing or affected thereby." This language, coupled with the fact that the latter part of sec. 2 would be quite useless unless unregistered instruments be held not to be binding, affords strong argument in favor of that view.

This act does not apply to those whose lands are bound virtute 8, does.

In one respect perhaps, the act hardly affords sufficient information to purchasers, because it only relates to instruments of which a copy can be registered, and as above offici: as the mentioned, there are persons whose lands are bound though corresponding they may not have given any instruments, viz., those whose Imp. sot 2 & 3 Vic. ch. 11, s. lands are bound under the Stat. Eliz. virtute officii, and those who may owe debts on simple contract, if they were known public officers or accountants to the Crown.

The Imperial Statute 2 & 3 Vic. ch. 11, s. 8, expressly provides in reference to the Stat. 13 Eliz., that the name abode, title, &c., name of the office, and time of acceptance shall be registered.

29 Vic. ch. 28. s. 28, as to assets.

By the Act of 29 Vic. ch. 28, s. 28, before treated of the Crown has no priority on administration of assets.

<sup>(</sup>a) Ante p. 312.

<sup>(</sup>d) Bank of Upper Canada v. Brough, 2 Err. & App. Rep. 161, p. raper, C. J., (c) Con. Stat. ch. 1, s. 9. Draper, C. J.

Finally, bonds, covenants, or other securities to the Crown liens rown, entered into after 15th August, 1866, have no now abolished. reater effect than between subjects by Stat. 29 & 30 Vic. b. 43. which is as follows:

VIC. 29 & 30, CH. 43.

IN ACT TO AMEND THE LAW OF UPPER CANADA RELATING TO CROWN DEBTORS.

Assented to 15th August, 1866.

Whereas by law in Upper Canada, the property real and per- Preamble. mal of any person entering into any bond or covenant or being debted to the Crown, is bound by such bond or covenant from e date thereof, and from the incurring of such debt: and hereas it is desirable that such bonds, covenants and debts made due by a subject to the Crown, should be placed on the same oting as if they were made or due from a subject to a subject herefore, Her Majesty, by and with the advice and consent of e Legislative Council and Assembly of Canada, enacts as follows:

1. No bond, covenant, or other security, hereafter to be made Bonds, &c., to entered into by any person to Her Majesty, her heirs or suc- the Crown to seors, or to any person on behalf of or in trust for Her Majesty, bind only such property as r heirs or successors, shall bind the real or personal property would be such person so making and entering into such bond, covenant, bound in other other security, to any further, other or greater extent than if ch bond, covenant, or other security, had been made or entered to between subject and subject of Her Majesty.

- 2. The real or personal property of any debtor to Her Majesty, Property of m heirs or successors, or to any person in trust for or on behalf Crown debt-Her Majesty, her heirs or successors, for any debt hereafter as if due to a ntracted, shall be bound only to the same extent, and in the subject. me manner as the real or personal property of any debtor where debt is due from a subject of Her Majesty.
- 3. The statute chapter five of the Consolidated Statutes for Cap. 5 of Con. pper Canada, shall be and the same is hereby repealed, except Stat. U. C. to such securities as are mentioned in the first section of that repealed. atute, which had been made or entered into before the passing Exception.

This act, by section 2 probably, would extend to those hose lands are, as above mentioned bound virtute officii nder the act of 13 Eliz.

## MORTGAGES.

## STATUTES.

- Con. Stat. c. 18, s. 10, and the English Bankrupcty Acts as reputed ownership.
  - " c. 22, ss. 257, 258, 259, 260 as to sale under execut of the equity of redemption.
  - " c. 22, s. 261—Seizure of mortgage under execution
  - " c. 73—Right of married woman to redemption mon on mortgage to her.
  - " c. 83, s. 10—Mortgage by tenant in tail.
  - " c. 87—Release by executors—merger—purchase mortgagee of the equity of redemption-
  - " c. 88, s. 19—As to arrears of interest.
- 24 Vic. c. 41, s. 6-Amending Consolidated Statute, chapter
- 27 " c. 13 Extending Con. Stat. c. 22 to heirs, executors: administrators of mortgagor.
- " c. 15—Sale of lands on execution against executors administrators.
- 27 & 28 Vic. c. 31—The act as to short form of mortgages 31 Vic. c. 20, ss. 60, 61, 62—Release of mortgage unde Registry Act.
- " c. 20, ss. 66, 67, 68—Notice—Priority of regiagainst equitable interests—Tacking—Coving.
- 32 " c. 9—Release of mortgage by married woman.
- " c. 10—Release by executors of mortgagee and assign redemption moneys and land.
- Imp. Stat. 14 Geo. 3., c. 78, s. 83—As to insurance mo laid out on the property.

It is proposed to treat of the above-named a considering the various clauses of an ordinary and at the same time to remark on other matterquent occurrence, or of chief importance mortgages.

In an ordinary mortgage in fee simple, f habendum come, 1st, the proviso for rede

ovenant for payment; 3rd, the covenants for title: in special clauses are frequently introduced to furnish er security and remedy to the mortgagee, as, 4th, a ant to insure and keep up insurance: 5th, a power of on default: 6th, an attornment clause, or a power of ess: 7th, provisions for reduction or increase of inteeccording to punctual payment; and lastly the provifor possession by the mortgagor till default.

e proviso for redemption is to the effect that if the The proviso gagor, his heirs, executors, administrators or assigns, for redemption. the mortgagee, his executors, administrators or assigns rincipal moneys and interest on certain days named. onveyance shall be void: or as is the better mode, that nortgagee, his heirs or assigns shall, at the cost and ret of the mortgagor &c., re-convey to him, his heirs or Sometimes though rarely, a place and hour is ed for payment; a provision that deposit to the credit re mortgagee &c., in a specified bank, shall be a good uent, may well be inserted, and avoids the inconvenience personal legal tender to the mortgagee, which he can t on if within the country.

ne money should be made payable to the mortgagor his personal representatives, not to the heirs; and igh on death of the mortgagee the legal estate will ded to the latter, still by the act of 32 Vic. ch. 10, herer referred to, the former can on payment of the whole ny part, re-convey the whole or any part of the lands, n any arrangement exonerate the whole or any part of lands, without payment.

hen the instrument is badly drawn, much difficulty Change in sometimes arise in those cases in which the redemption gagor by e gives the right of redemption or of re-conveyance to wording of who would not be entitled to the estate if no mort-proviso. had been made; in other words, the question is made ise whether the beneficial interest in the property is ged by the proviso and vested in others. It not unlently happens that in a mortgage of the property of a cied woman, the proviso is for redemption by or re-

conveyance to, the husband and his heirs, and the question is whether this amounts to an alteration of the title to the equity of redemption. If the mortgage contain no other evidence of intention to transfer the equitable estate to the husband than a mere proviso as above, it would seem tolerably clear no such transfer would take place (a). It is when the instrument does contain some other evidence by recital or otherwise, not clear or conclusive, that the greatest difficulty arises. It may be stated generally that the indication of intention from which a change in the title, ultra the mortgage, is to be inferred, must be a strong On the one hand, the draughtsman who desires not only to draw a mortgage, but to change the course of title to the equity of redemption, should never omit to insertan appropriate recital, as the best evidence of intention tothat effect; and on the other hand there is no need to apprehend that the title to the equity of redemption will be transferred, contrary to intention, by its being reserved to the mortgagor, his heirs, executors, administrators or assigns. when he is not owner in fee, or by any other mere want of accurate adaptation of the proviso for redemption to the state of the title (b).

On mortgage by tenant in tail for a freehold interest, heirs general entitled to redeem.

The case of a mortgage by tenant in tail for any free-hold interest (other than pur autre vie) is by Correstat. ch. 83, s. 10, as hereafter explained, an exception to the general rule that the beneficial interest results as of the old estate in the absence of evidence intent to the contrary, for such a mortgage is a bar to the heirs in tail to the extent of the estate created, notwith on a mortgage in fee the equity of redemption will below to the mortgagor not as tenant in tail but freed of the entail, and descend to heirs general instead of to the heir in tail.

<sup>(</sup>a) Davidson on Conv. vol. 2, 528, 2nd ed. referring to Whithread Smith, 3 De. G. M. & G. 727.

<sup>(</sup>b) Davidson on conveyancing supra; see further notes to Rarl Huntingdon v. Countess of Huntingdon, 2 W. & T. Lg. Ca. 928; Jackson v. Innes, 1 Bligh, 101.

If the proviso for redemption be that on payment on a Reconveyay named the mortgage shall be ipso facto void, then in ance, when rictness no reconveyance to the mortgagor is requisite, lough it would still be prudent to procure it, as otherwise idence of the punctual payment must be preserved and ven in order to shew that the legal estate is not outanding in the mortgagee. Where the proviso is thus orded, and punctual payment is not made, or where the oviso is merely for re-conveyance, then of course that is misite.

The provisions of the Registry Act, 31 Vic. ch. 20, as rards releases of mortages are as follows:

60. When any registered mortgage shall have been satisfied, Release under e registrar, on receiving a certificate executed by the mortga- Registry Act e, or if the mortgage has been assigned and such assignment 31 Vic. ch. 20. gistered, then executed by such assignee, or by such other rson as may be entitled by law to receive the money and to scharge such mortgage, in the form J, in the Appendix hereto. to the like effect, executed in the presence of one witness, and ily proven by the oath of the subscribing witness thereto, in e same manner as herein is provided for the proof of other struments effecting lands, shall register the same, and every affiwit attached thereto or endorsed thereon, at full length in its roper order, in the registry book, and numbering it in like sanger as other instruments are required to be registered and umbered, and also by writing in the margin of the register herein the said mortgage has been registered, words to the folwing effect :- "See certificate purporting to be discharge signed , (naming the person who has executed the me)," and "see registry number of such certificate

Book (stating the same according to the fact)," and which marginal entry the registrar or his deputy shall affix name, and the same shall be deemed a discharge of such ortgage, and such certificate so registered shall be as valid and ectual in law as a release of such mortgage, and as a convey\_ ce to the mortgagor, his heirs, executors, administrators or igns, or any person lawfully claiming by, through or under n or them, of the original estate of the mortgagor,

81. In case the mortgagee or any assignee of the mortgagee, As to release tires to release or discharge part only of the lands contained in of part only

As to release of part only.

such mortgage, or to release or discharge only part of the monespecified in the mortgage, he may do so by deed or by a certificate to be made, executed, proven and registered in the same manners. in cases where the whole lands and mortgage are wholly release and discharged: and such deed or certificate shall contain as precise a description of the portion of lands so released or discharge as would be necessary to be contained in an instrument of conveyance for registry under this act, and also a precise statement

of the amount or particular sum or sums so released or dis-

Portion released to be described

charged. Certificate of

62. Every certificate of payment or discharge of the mortgage. pryment, &c ; or of the conditions therein, or of the lands or of any part of the whatever time same, or of any part of the money, by the mortgagee, or his assignee, his heirs, executors, administrators or assigns, or any one of them, at whatsoever time given, and whether before or after the time limited by the mortgage for payment or performance, shall be valid, if in conformity with this act, to all intents and purposes whatsoever, as herein mentioned.

# Referred to in the 60th section of this Act.

To the Registrar of the County of

, do certify that , of satisfied all money due on, or to grow due on, (or hath satisfied the sum of \$ mentioned in) a certain mortgage made by , to which mortgage bears date the day of A.D. 18 and was registered in the Registry Office for the County of , A.D. 18 minutes past , at on day of il S noon, in Liber o'clock for No. (here mention the day and date of registration if each assignment thereof, and the names of the parties—or mention that such mortgage has not been assigned, as the fact may (r) and that I am the person entitled by law to receive the money. and that such mortgage, (or such sum of money as aforesaid, such part of the lands as is herein particularly described, that is :) is therefore discharged. Witness my hand this day of A.D. 18

A. B.

Stating residence and occupate

One Witness.

in considering hereafter the act of 32 Vic., ch. 10, the Danger of reager is pointed out of a mortgagee releasing part of the leasing part of the lands in ds to the mortgagor with notice of sale by him of another certain cases. t on which he has agreed to indemnify the vendee unst the mortgage.

It is to be observed that a release under the act will not Release will rate as a re-conveyance till registered; till then it is not operate till register. t evidence of payment (a); nor will it apparently nor unless the operate unless the mortgage be registered, and if mortgage and igned, unless the assignment be registered. The any, be registered of release given by the act implies that such re-execution of ration must precede the execution of the release. ling that it was expedient to deny efficacy to a discharge er the act unless the mortgage, and assignments, if any, registered (which may be doubted), the act certainly s unnecessary inconvenience in requiring the hour and ute and number of registry of the mortgage and all asments to be set forth, for it frequently happens in practhat a discharge which would otherwise be executed. not be granted for the reason that the deeds are not becoming to furnish the information as to their registry. payment and discharge both stand over till the regiscan be written to for the particulars. In this and other ects the act seems to be drawn more for the conveni-≥ of the registrars than of the public.

As\_ release.

ection 61 was unnecessary, the law was before this to sec. 61 of Resame effect as thus enacted as to a discharge under the gistry Act of part of the lands (b); and surely it required no cial legislation to enjoin in case of part payment that amount paid should be specified; or to give ability "to wase or discharge part of the money;" or, when the intion was "to release or discharge part of the lands" to horize the mortgagee " to do so by deed."

t is perhaps to be regretted that the Legislature had not Ply authorized "such person as may be entitled by law

Lee v. Morrow, 25 Q. B. U. C. 604; Sidey v. Hardcastle, 11 Q. B. . 162, per Burns, J. (b) Re Ridout, 2 C. P. U. C. 477.

# RELEASE UNDER THE REGISTRY ACT

to receive the money," to give a discharge, instead of superadding to the above the words "and to discharge such mully while may be persons authorized to resire the money and yet not authorized to give a discharge of the give and yet and yet a discharge of the give a discharge o one money and yes not admission we give a discussive enforce. An attorney in a suit to enforce rating as a re-conveyance. payment of the mortgage money stands in this position, so 22, also the sheriff who under Con. Stat. 22 ss, 261, 262 has 22, also the sherin who under execution against the mortege under execution against the mortege.

12. seized a mortgage under execution against the mortgage. and enforced payment from the mortgagor. reasonable that in such and similar cases the authority reasonable onat in such and similar cases are such it power to reconvey, and receive should carry with it power to reconvey, and receive should carry with the power to reconvey, and principle has been recognized by the Legislature in g

power to executors to re-convey by the act of 32 V The discharge under the Registry Act does not 10, presently referred to.

tion on

ntitled.

scharge if learnt not the ordinary covenant against incumbrances which versal on re-conveyance by deed; it may be add form, but unless sealed it will only operate as a m against the releasor on the assertion in the for tion and not as a covenant. the act, that he was entitled to receive the mor by his own act or wilful default he should no The Act of 32 Victoria provides as to certif so entitled.

charge of mortgage as follows:

32 VIC. CH. 9.

AN ACT TO AMEND THE REGISTRY ACT, AT PROVIDE AS TO THE CERTIFICATES OF M TOUCHING THEIR CONSENT AS TO TH DEEDS OF CONVEYANCE.

Whereas it is desirable to amend the Regi 80 far as to give certainty to the right of u with their husbands to execute certificates gage Therefore, Her Majesty, by and w sent of the Legislative Assembly of the Preamble. enacts as follows ;—

on and after the passing of this act, when any registered How morte of lands wherein a married woman may happen to be gages to married women agee therein, or whereof the assignee is a married woman, may be disve been satisfied, the Registrar, on receiving a certificate, charged. I jointly by such married woman and her husband, in the escribed by the Registry Act of Ontario, shall register tificate in the same manner provided by said act for regcertificates of discharge of mortgage, and such certificate deemed a discharge of such mortgage to the same effect other certificates registered under the said act; and it it be necessary to produce any certificate of such married having been examined before any Judge or Justices of the puching her consent therein in anywise; nor shall such ition be necessary.

case more than one married woman executes the same One certificonveyance mentioned and referred to in the second sec- cate may emchapter eighty-five of the Consolidated Statutes of Upper names. the Judge or Justices of the Peace therein mentioned clude the examination and names of all or any number of arried women in one certificate in the form mentioned and in the said section as far as applicable.

e of the former remarks as to releases under the ry Act apply equally to this act.

e the statute consolidated by Con. Stat. ch. 73, there Sec. 1 unnebut few cases wherein, when a married woman is cessary and d to mortgage moneys, she is not so entitled to her te use under that statute. As far as the author is it has not been usual in practice on obtaining from ied woman a certificate of discharge of mortgage, to e compliance with Con. Stat. ch. 85: and neither the woman is entitled to the moneys to her separate or even in the few and exceptional cases whereis not, would such compliance appear to have been Under Con. Stat. ch. 73, she is to "have, hold ijoy" free from the control and disposition of her ad as fully as if unmarried. She would be compereceive, and give a receipt, as a feme sole, for her 's, and the form of discharge given by the registry

act is but a receipt in writing, though the act gives it when registered, and not till then, the effect of a re-conveyance. The receipt then works a reconveyance by operation of law, by force of the Registry Act; in itself it does not Its encroach- profess to convey. If the view of the author be correct, then the act has considerably encroached on the rights ried women to given to a married woman by Con. Stat. ch. 73, and practically placed the obtaining of her mortgage moneys under the control of her husband

ment on the rights of marcontrol their separate estate.

Con. St. ch. 90. s. 9. as to payment to surviving mortgagee. his executors, statute.

Con. Stat. ch. 90, s. 9, as to payment to the survivor of mortgagees, or the executors or administrators of the survivor their or his assigns is treated of in considering that

## 32 VIC. CH. 10.

AN ACT TO MAKE BETTER PROVISION FOR THE DEALING BY EXECUTORS AND ADMINISTRATORS WITH MORTGAGES.

Assented to 19th December, 1868.

Whereas it is expedient to make better provision for the dealing by Executors and Administrators with Mortgages.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :---

Repeals Con. Stat. ch. 87. s. 5.

release mortgage debt and the lands.

1. The fifth section of the act chaptered 87 of the Consolidated Statutes of Upper Canada is hereby repealed.

2, When any person entitled to any freehold land by way of may assign or mortgage has departed this life, and his executor or administrator tor has become entitled to the money secured by the mortgage, of has assented to a bequest thereof, or has assigned the mortget debt, such executor or administrator, if the mortgage money was paid to the testator or intestate in his lifetime, or on pay ment of the principal money and interest due on the mortgage, of on receipt of the consideration money for the assignment, my convey, assign, release or discharge the mortgage debt and the legal estate in the land; and such executor or administrator shall have the same power as to any portion of the lands on pr ment of some part of the mortgage debt, or on any arrangement for exonerating the estate, or any part of the mortgaged limit without payment of money; and such conveyance, assignment, "

r discharge shall be as effectual as if the same had been by the person having the legal estate.

s act is taken from the repealed section of Con. This act taken ch. 87, which however, gave no power to assign the in part from former acts. aged lands. That statute was framed in part from pealed Imperial Act of 7 & 8 Vic. ch. 76, s. 9, and the stions contained in the letter, of Mr. Kerr regarding

requently happened that a mortgagee died, and his Deficiency of nal representatives, or a legatee, became entitled to former acts, ortgage moneys, whilst the legal estate descended to eir-at-law in the absence of any disposition thereof by The heir-at-law thus became trustee for rson entitled to the moneys, and on payment therethe party to reconvey. Con. Stat. ch. 87, s. 5, was led to remedy this inconvenience, but it did not go ough (b), for it would seem that whilst the statute nplated the case of an assignment by the executor or istrator of the mortgage debt, it gave no power to gave no power the lands (c), though on payment to the assignee land. debt the executor or administrator might apparently rey the legal estate.

vould seem that the words "executor or administra- One of several re nomina collectiva, and that one of several per-cannot rerepresentatives cannot release (d).

ere the mortgage money has been paid to a creditor As to the act as seized the mortgage under execution against the boing compalagee (e), or has garnished the debt, as also in one of pect of release ses contemplated by the act, viz., payment made to in certain cases. ortgagee himself, it might perhaps have been advishave made it compulsory on the personal represento release, unless indeed the responsibility thus n on him might be deemed too great in such cases,

<sup>(</sup>b) See Ker's letter in appendix. lee the letter in the appendix. lobinson v. Byers, 9 Grant, 572; see however, per Draper, C. J., v. Farr, 23 Q. B. U. C. 328.

or the act as it is, could in a court of equity, be taken as compulsory.

The act does not warrant release of part when residue is not of sufficient 'value.

The power given by this section to release part of the land on payment of part of the debt in no way prevents the application of the rule, that personal representatives. or others occupying a fiduciary position, must in any such transaction proceed with due caution at their peril and see that the value of the security is not prejudiced by a release of part. It may be also where part of the security is released for a manifestly inadequate amount, and the remainder is not sufficient to answer the mortgage delt, that the executor or administrator so releasing would not only be personally responsible, but the release avoided s against the releasee and all claiming under the release with notice as a breach of trust (a).

nor a sale or release of part ment by mortgagor to pay

So also where the mortgagor has sold part of the prorelease of part when releasor perty, and agreed with the vendor to pay off the mortgage. has notice of if the mortgagee release the residue or join with the morta prior sale of gagor in an absolute sale of it as free from the mortgage, with an agree- with notice of the prior sale and agreement, and without the assent of the first vendee, the part so sold will be rethe mortgage, leased from the mortgage; even though the mortgagee, and not the mortgagor, have received the proceeds of the second sale: and this will equally be so if the sale be under a decree in a suit by the mortgagee to which the first vendor is no party (b). The principle is that as between the mortgagor and the first vendee, the lands unsold become principally and solely liable, and as regards the mortgagee they are in the position of surety for the debt, who, having notice can do nothing to prejudice the right of the owner of lands first sold to have assigned to him on payment of the mortgage debt the lands so principally liable to him But the mortgagee can sell under a power of sale in his mortgage, for the power is paramount to any right of the vendee. So also where a mortgagor sells part with at

but a mortgagee can still sell under a power in the mortgage,

<sup>(</sup>a) Davidson Convey. 2 ed. vol. 2, p. 710; Lewin on Trusts, 5

<sup>(</sup>b) Gowland v. Garbett, 18 Grant, 578; see also Guthrie v. Shidh therein referred to.

reement to pay off the mortgage, a release by the mort- or release to a gee to the vendee will not prejudice his security as purchaser as ainst a purchaser of the equity of redemption who had sequent purtice of the prior sale (a).

against a subchaser of the equity with

The Con. Stat. ch. 87, ss. 1, 2, as amended by 24 Vic. ch. notice. , may here be alluded to. These sections are as follows:

## CON STAT. CH. 87, SECS. 1, 2 & 3.

1. Any mortgagee of freehold or leasehold property, or any Con. Stat. ch. ignee of such mortgagee, may take and receive from the mort- 87, ss. 1 & 2. gor or his assignee, a release of the equity of redemption in on release or th property, or may purchase the same under any power of sale purchase of his mortgage, or any judgment or decree, without thereby demption. rging the mortgage debt as against any subsequent mortgagee registered judgment creditor) having a charge on the same operty, 14 & 15 Vic. ch. 45, s. 1.

as to merger

2. In case any such prior mortgagee or his assignee, takes a When prior ease of the equity of redemption of the mortgagor or his mortgagee ignee in such mortgaged property, or purchases the same under lease of equity y power of sale in his mortgage, or any judgment or decree, no of redemption. bequeut mortgagee or his assignee or registered judgment quent mortditor, shall be entitled to foreclose or sell such property with gages not entitled to purtredeeming or selling subject to the rights of such prior mort-chase or sell see or his assignee, in the same manner as if such prior property withrtgagee or his assignee had not acquired such equity of redemp. &c. 14 & 15 Vic. ch. 45, s. 2.

shall take re-

I This act shall not effect any priority or claim which any Priority unrtgagee or judgment creditor may have under the registry der register 8. 14 & 15 Vic. ch 45, s. 3.

affected.

By 24 Vic. ch. 41, sec. 6, the above sections are to be 24 Vic. ch. 41, d and construed as if the words "or registered judg-s. 6 varies Con. St. ch.87. nt creditor" and "or judgment creditor" were omitted rein

The Con. Stat. applied to prevent merger not only as Con. St.ch.87. inst a mortgagee but also as against a registered judg- as varied by 24 Vic. ch. 41, nt creditor, and if the act of 24 Vic, ch. 41, had no will not per se ther affected the Con. Stat. than by abolishing registry protect on merger as judgments, it is probable that the Con. Stat. would have againstexecu-

tion creditor,

<sup>(</sup>a) Crawford v. Armour, 13 Grant, 576.

been construed to extend to execution creditors. The act of 24 Vic. s. 6. however enacted that the first and second sections of the Con. Stat. should "be read and construed as if the words or registered judgment creditor were omitted therein." The consequence is that the Con. Stat will not per se protect a mortgagee buying the equity of redemption as against a mesne execution creditor. question apart from the act is presently considered.

but mortgagee paying a prior charge is entitled to lien as against mesne incumbrances. This act applies, not where equitable owner of the property becomes owner of the charge, but where owner of the charge acquires the absolute or equitable ownership in the property.

non-applica-

tion of the act

A mortgagee however, who as such pays off a prior charge to protect his title, is entitled to a lien for the amount as against mesne incumbrances (a).

The statute seems to apply where the owner of the charge, or mortgagee having the legal estate, acquires the absolute ownership of the property, not where the owner of the equity of redemption (who in equity is still regarded as substantially the owner of the property subject to the charges), acquires the charge (b). Cases under the latter head and the law of merger thereon, will probably more frequently occur on sale by the sheriff under the C. L. P. Act. where the equity of redemption should be sold subject to two mortgages, and the purchaser should pay off the first: decisions on which are hereafter referred to. The obscurity of the act has been severely commented

on (c), and it has been said it "is not to be extended beyond its letter" (d). Thus it has been held not to apply Other cases of to protect a registered judgment creditor who bought the equity of redemption at sheriff's sale, and subsequently got an assignment of the first mortgage as against a mesne incumbrance (e); nor to an equitable quasi-mortgagee, as a vendor retaining a lien for his purchase money, and subsequently acquiring the estate (f).

(a) Trust & Loan Company v. Cuthbert, 14 Grant, 410.

(f) Finlayson v. Mills, 11 Grant, 221, per Spragge, V. C., in appen

<sup>(</sup>b) See the distinction in the notes to Forbes v. Moffatt, Tud. Lg. Ca.

<sup>(</sup>c) See Watkins v. McKellar, 7 Grant, 584, per Blake, C., and Bank of Montreal v. Thomson, 9 Grant, 58, per Esten, V. C.

<sup>(</sup>d) Bank of Montreal v. Thomson, 9 Grant, 58; see also, pe Van Koughnet, C., in Heward v. Wolfenden, 14 Grant, 188.

<sup>(</sup>e) Bank of Montreal v Thomson, supra; see also McDonald v. nolds, 14 Grant, 691.

These sections were passed to prevent the application of e law of merger on release of the equity of redemption the mortgagee, under which the mortgage was regarded extinct, and could no longer be set up as against subseent incumbrances of which the purchaser of the equity redemption had notice (a), who thus were let in to priity. As a general rule, a man cannot own an estate and 30 a charge on it, thus being at the same time debtor and editor to himself, in such case, as a general rule, a merger the charge takes place to avoid confusion of rights.

It has been said that, contrary to former decisions, "the Merger, how ourse of judicial decision appears to have done the same avoided apart from the act. ing, or nearly the same thing, in England, since the ussing of our statute," as these sections (b). Recent ses establish that a mortgagee purchasing the interit of the mortgagor, may preserve his mortgage by zidence of express stipulation or clear intention to eep alive the mortgage (c): and the fact of its being the interest of the purchaser to keep alive the mortage, has been said to be a matter for consideration in etermining the question of merger (d); and it would em that where the mortgagee acquires the equity of edemption by devise or inheritance, evidence of intention nd of interest are of more weight, and more readily govrn to prevent merger than where he acquires it by conract and conveyance (e).

As before remarked, the statute does not apply as statute does gainst an execution creditor, nor to the case of a pur-not prevent haser of the equity of redemption paying off prior charges purchaser of

merger, where

<sup>(</sup>a) As to notice see the judgment of the Chief Justice in Street v. Commercial Bank, as referred to by Blake, C., in Emmons v. Crooks, l Frant, 166.

<sup>(</sup>h) Finlayson v. Mills, 11 Grant, 231, per Mowat, V. C., in appendix nereto; Watts v. Symes, 1 De. G. Mc. & G. 240; Cooper v. Cartwright, John. 686; see Elliott v. Jayne, 11 Grant, 415, per Spragge, V. C.

<sup>(</sup>c) See cases, supra, n. b.; Forbes v. Moffatt, Tud. Lg. Ca. 2 ed. 845, in notes; Mayhew on Merger, 119 et seq.; Fisher on Mortgages, 2 ed. 785,

<sup>(</sup>d) Elliott v. Jayne, 11 Grant, 414, per Spragge, V. C. post, p. 351 n. b (e; Finlayson v. Mills, supra, per Mowat, V. C.; Emmons v. Crooks, 1 Grant, 167, per Blake, C.

the equity buvs up a charge.

which it may be advisable to keep alive as against su sequent incumbrances (a). As to such charges so page 3 off, the priority of which it is desired to preserve, it has been said to be "good conveyancing to have them sassigned to trustees, but it does not seem to be necessary

interest of purchaser govern.

(b). The assignment should contain express declaration Intention and of intention to preserve the charge (c). Apart from an assignment it has been said to be "settled law that the purchaser of an estate may get in outstanding incum brances without merging them, and that there shall be no merger if the owner of the estate manifests an interation to keep the incumbrances alive, and its being his interest that they should be kept alive is evidence of such being his intention (d)."

Case of purty of redemption subject to incumbrances which purchaser is bound to his vendor to pay off; if paid off will they merge?

There is apparently some difficulty as to the law of chaeer of equi-merger where the second section of Con. Stat. ch. 87 does not apply, in regard to a charge paid off by a purchaser of the equity of redemption where there is no express stipulation as to keeping alive the charge, and his interest or intention to have such charge kept on foot, as against a mesne incumbrance, conflicts with his duty, or an implied obligation to the vendor of the equity of redemption who has also created the charge. Thus, where a man should buy an equity of redemption sold by the sheriff under Con. Stat. ch. 22, (C. L. P. Act) subject to two mortgages granted by the execution debtor, and should pay off the first, it would seem that having notice of both mortgages at the time of sale, he should not be entitled to set up the first mortgage as against the second mortgagee. Con. Stat. ch. 87, as before explained, does not apply in such case for the benefit of the equitable owner buying in the first mortgage. The purchaser is to be assumed "to pay so much less for the estates in consequence

<sup>(</sup>a) See Bank of Montreal v. Thomson, 9 Grant, 58, per Esten, V.C.

<sup>(</sup>b) Elliott v. Jayne, 11 Grant, 414, per Spragge, V. C.; see also Beaty v. Gooderham, 13, Grant, 320.

<sup>(</sup>c) Davidson. Conv. 2 ed. vol. 2, p. 249; Fisher on Mortgage, 2 ed. vol. 2, p. 793; Beatty v. Gooderham, 13 Grant, 317.
(d) Elliot v. Jayne, supra.

the existence of the mortgages, and deemed therefore to dertake to discharge them both " (a). Moreover. Con. t. ch. 22. expressly throws on the purchaser the liability Day the mortgages, and gives the mortgagor a remedy ragainst him in case the mortgagor should pay: if the sed mortgagee sues the mortgagor on his covenant to r. he in turn sues the purchaser of the equity of reaption for indemnity, which leads to some circuity of ion. The position and interest of the mortgagor also to be considered on the question of the merger (b). would seem therefore, in such case that unless there at the time of sale the assent of the mortgagor-vendor Lt his vendee shall be entitled to keep on foot the first rtgage, that it will be merged as against the mesne inmbrance of which the vendee of the equity of redempn had notice (c).

The case of Finlayson v. Mills on the construction of the General expoand the law of merger generally affords most useful sition of the law in Finlayormation, and it will be found in the appendix to this son v. Mills. atise.

The following remarks of the late Vice Chancellor Esten, Blake V. delivering judgment in Blake v. Beaty (d) will also be of Beaty. vice. He says :-

' From these authorities we think the rule to be deduced The right to that where the charge which has been satisfied is the keep paid off charges on per debt of the party paying it, either by force of the foot. ginal contract by which it was created, or in consequence the purchase of the estate subject to it, and the stipulaas accompanying such purchase, or any express or imed contract, making it his duty, as between him and the

v. Wilkes, 5 Grant, 594; see also Bank of Montreal v. Thompson, rant, 59, per Esten, V. C.

<sup>)</sup> Finlayson v. Mills, 11 Grant, 225, per Mowat, V. C., see appendix; mons v. Crooks, 1 Grant, 167, per Blake. C., ante p. 349 n. d.

McDonald v. Reynolds, 14 Grant, 691; Blake v. Beatty, 5 Grant, 58nk of Montreal v. Thomson, 9 Grant, 59; Emmons v. Crooks 1 nt, 167 per Blake, C.; Woodruff v. Mills, 20 Q. B. U.C. 51; but see Elt v. Jayne, 11 Grant, 412, referring to Watts v. Symes, 1 DeG. M. & G.; see also Beatty v. Gooderham, 13 Grant, 317. (d) 5 Grant 359.

The right to keep paid off charges on foot. person from whom he has purchased, to discharge it, he cannot keep it alive as a primary charge against any meane incumbrances, which also it was imposed upon him by the terms, express or implied, of his contract of purchase to discharge; but if by the terms of his contract he was not bound to discharge the incumbrance in question, or although he was bound to discharge that, if he was not bound to discharge any mesne incumbrances affecting the same estate, it would be competent to him to maintain the incumbrance he has discharged as a subsisting charge, in the former case for his reimbursement, and as standing in the place of the incumbrancer, in the latter case, for his protection.

"A purchaser of an equity of redemption may also perhaps stipulate with his vendor, while he enters into an engagement to indemnify him against all the incumbrance effecting the estate, that he shall be at liberty to keep any incumbrance he may discharge on foot as against the subsequent incumbrances so as to make his bargain as beneficial as possible.

"In all these cases the principle seems to apply of modus et conventio vincunt legem, and the incumbrancers are simply not permitted to be damnified by the arrangement made between the contracting parties, which would be unjust; while at the same time no necessity exists for placing them in a better condition than that in which they would otherwise stand. They retain all the remedies they ever had, but acquire no new ones."

Can a mortgagee buy under his power of sale?

On one important point it is believed there is some conflict of opinion among common law members of the profession; viz., whether apart from any question of merger, this statute does not warrant a mortgagee in buying himself under a power of sale in his mortgage, thereby virtually obtaining all the benefit and effect of a foreclosure in equity, and occupying at the same time the position both of vendor and vendee. This would be contrary to well established principles breaking in upon which is a strong argument against any interpretation of the statute which would allow it; still it must be confessed, there was room for question.

it seems to have been decided that a mortgagee so buywill still continue mortgagee, and liable to be redeemed the mortgagor on bill for redemption (a). Undoubtedly ler Con Stat. ch. 22 s. 259, hereafter alluded to, a mortee may purchase for his own sole benefit the equity of emption of his mortgagor at sheriff's sale, and that even an execution in which he is plaintiff, but there the above is not offended, for the sheriff a public officer assumed do his duty, intervenes between the parties, and he, the mortgagee, conducts the sale, and (on a fi. fa. east), cannot sell at a sacrifice, is compelled by statute ive adequate notice, and is bound to proceed with due and to the interest of the debtor (b); moreover, the distion above alluded to, where the sheriff intervenes, has a recognized in adjudged cases (c).

o far as this statute, ch. 87, enables a mortgagee to ive from the mortgagor a release of the equity of emption, or purchase the same under any judgment. lout merging the mortgage debt as against a subsequent tgagee, there is not so much difficulty; for in the first e that does not offend against the rule that the mortga-. shall not sell to himself, and for the reasons above given; next but for the statute the effect might be as above ained, to cause a merger of the legal, by its coalition 1 the equitable estate, and thus mesne incumbrances ld stand first. But when a mortgagee sells under his er of sale, it is not the mere equity of redemption which ells, but the legal estate in the lands, and the effect and ect of the power is to enable him to sell such legal estate from any equity of redemption. On any sale under power, the purchaser need care nothing for incum-

<sup>)</sup> Watkins v. McKellar, 7 Grant, 584; see also post p. 377 as to cirtances under which the court will set aside a purchase by morter of equity of redemption.

Henry v. Burness, 8 Grant, 356; Bethune v. Corbett, 18 Q. B. U. 8; McGill v. McGlashan, 6 Grant, 324; see also ante pp. 329, 330. Stratford v. Twynam, Jacobs, 418; McGill v. McGlashan, 6 Grant, Mohawk Bank v. Atwater, 2 Paige, 54; Woods v. Monell, 1. Chan. Ca., 502, American; see also McKinnon v. McDonald, 13 t, 152.

brances subsequent to registry of the mortgage, his title under the power will be paramount to any such (a): and so by parity of reasoning, if the mortgagee were the purchaser (assuming he could sell the legal estate to himself), he would also take freed of the equity of redemption, and paramount to incumbrances subsequent to his mortgage: no question of merger in such a case would arise, for the mortgagee is not selling the equity of redemption, retaining the legal estate, but the latter, freed of the former, as authorized by the The statute seems to assume, that a mortgage selling under his power of sale, can and sometimes does sell the mere equity of redemption, and is based on that supposition; for referring to it, it enacts that the mortgage "may purchase the same": assuming even that under powers of sale as usually drawn such a sale could be had, it has never happened in practice, at least on behalf of a first mortgagee. Possibly the Legislature contemplated the case case of sale by of a mortgagee, other than the first selling under the power a second mort- of sale, in which case in one sense it would be a sale of an equity of redemption.

The Act may perhaps contemplate the gagee.

St. 27 Vic. ch. The provisions of the Con. Stat. ch. 22, C. L. P. Act, and 13, and Con.

St. ch. 22, ss. the act of 27 Vic. ch. 13 amending it, as to sale by the 257, 258, 259, sheriff under execution of the equity of redemption of the sheriffof equi. mortgagor, are as follows:

260, sale by ty of redemption.

CON. STAT. CH. 22, SECS. 257, 258, 259, 260.

The interest execution.

257. The sheriff or other officer to whom any writ of furi of mortgagors facius against the lands and tenements of any mortgagor of real estate is directed, may seize or take in execution, sell and convey, (in like manner as any other real estate might be seized or taken in execution, sold and conveyed) all the legal and equitable interest of such mortgagor in the mortgaged lands and tenements. 12 V. c. 73, s. 1.

Effect of such such sale.

258. The effect of such seizure or taking in execution, sale and conveyance, of any such mortgaged lands and tenements be to vest in the purchaser, his heirs and assigns, all the legal and

<sup>(</sup>a) Daniels v. Davidson, 9 Grant, 173, where a purchaser under a post of sale in a mortgage took paramount to a conveyance made even to the mortgage, but registered after its registration.

nitable interest, of the mortgagor therein at the time the writ is placed in the hands of the sheriff or other officer to whom the me is directed as well as at the time of such sale, and to vest such purchaser, his heirs and assigns, the same rights as such ortgagor would have had, if such sale had not taken place; and e purchaser, his heirs and assigns, may pay, remove or satisfy, y mortgage, charge, or lien, which at the time of such sale isted upon the lands or tenements so sold, in like manner as e mortgagor might have done, and thereupon the purchaser, his airs and assigns shall acquire the same estate, right and title, as e mortgagor would have acquired, in case the payment, remod or satisfaction had been effected by the mortgagor, and on syment of the mortgage money to the mortgagee by the puruser, his heirs or assigns, the mortgagee, his heirs or assigns sall, if required, give to such purchaser, his heirs or assigns, at s or their charge, a certificate of payment or satisfaction of such ortgage, which certificate may be in the following form, that to say :

o the Registrar of the County of

I, A. B., of , do certify that C. D., of , who hath scome the purchaser of the interest of E. F., of , hath tisfied all money due upon a certain mortgage made by the said F. to me, bearing date the day of one thousand ght hundred and , and registered at of the clock in ne forenoon (as the case may be) of the ne same year (or as the case may be) and that such mortgage is erefore discharged. As witness my hand, this day of

, one thousand eight hundred and

(Signed) A. B.

. H. of Witnesses. . H. of

nd such certificate shall be of the like effect, and shall be acted on by registrars and others to the same effect as if the same d been given to the mortgagor, his heirs, executors, administrars or assigns. 12 V. c. 73, s. 2.

259. Any mortgagee of lands and tenements so sold, or the Mortgagee sirs or assigns of such mortgagee, (being or not being plaintiff may become defendant in the judgment whereon the writ of fieri facias sheriff's sale. ader which such sale takes place has issued) may be the purpaser at such sale, and shall acquire the same estate, interest and

rights thereby as any other purchaser; but in the event of the mortgagee becoming such purchaser, he shall give to the mortgagor a release of the mortgage debt, and if any other person becomes such purchaser, and if the mortgagee enforces payment of the mortgage debt against the mortgagor, then such purchase shall repay the amount of such debt and interest to the mortgagor, and in default of payment thereof within one month after demand, the mortgagor may recover from such purchaser the amount of such debt and interest in an action for money had and received, and until such debt and interest have been repaid to the mortgagor, he shall have a charge therefor upon the mortgaged lands. 12 V. c. 73, s. 3.

The interest of a mortgagor in goods mortgaged may be sold in execution.

260. On any writ, precept or warrant of execution against goods and chattels, the sheriff or other officer to whom the same is directed, may seize and sell the interest or equity of redemption in any goods or chattels of the party against whom the writ has issued, and such sale shall convey whatever interest the mortgagor had in such goods and chattels at the time of the seizure. 20 V. c. 3, s. 11,—and see 12 V. c. 73, s. 1.

## 27 VIC. CH. 13, SECTION 1.

## An Act to amend the Common Law Procedure Act OF UPPER CANADA.

Assented to 15th October, 1863.

27 Vic. ch. 13.

Whereas doubts have arisen as to the meaning of the two sale of equity hundred and fifty-seventh, two hundred and fifty-eight, and of redemption two hundred and fifty-ninth sections of the Common Law Procunder execution against dure Act, being the twenty-second chapter of the Consolidated heirs, executors or assigns Statutes of Upper Canada: Therefore, Her Majesty, by and of mortgagor, with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

How sa. 257. 258 of Con. Stat. cb. 22, shall be construed.

1. Whenever the word "mortgagor" occurs in the said sections, it shall be read and construed as if the words "his heir executors, administrators or assigns, or person having the equitor of redemption" were inserted immediately after such wor "mortgagor;" and the equity of redemption in any freehous mortgage of real estate shall be saleable under an execution law against the lands and tenements of the owner of such equaof redemption in his lifetime, or in the hands of his executors ministrators after his death, subject to such mortgage, in the me manner as any lands and tenements can now be sold under execution at law.

Whether this section is retrospective in its operation Retrospectlmits of question (a).

It is by no means clear that the interest of a mortgagor can mortgachattels real, as leasehold interests, can be sold (b). It gor's interest in chattels ould seem tolerably clear that at least under s. 257 real be sold? Con. Stat. ch. 22. it cannot be sold (c).

Before the act of 27 Vic. ch. 13, it was held that the Before 27 Vic. uity of redemption could not be sold under the prior act of redemption less then vested in the mortgagor himself, and on an could not be ecution against him; if vested in an assignee it could not against exesold under execution against him (d). It was also held cutors or assignee of the even on execution against the personal representatives mortgagor. the mortgagor, the equity of redemption could not be 1 though the mortgagor should have died entitled (e).

The equity of redemption in one or some only of several Equity of recels of land mortgaged cannot be sold under this act, saleable in a therefore apparently no sale can be had at all where parcels; as, if lands lie in different counties (f): and it would seem several counfollow that the sheriff must offer all for sale in one lot; do not the same principle it would seem that where the demption uity of redemption is severed by conveyance by the severed. Ortgagor of part of the lands mortgaged before delivery the writ, no sale can be had; nor where, before delivery the writ, two or more mortgages are outstanding in ferent hands (g).

The equity of redemption cannot be sold unless "clearly The equity, to isting on the face of the mortgage;" it must exist theremust exist on

Miller v. the Beaver Association, 14 C. P. U. C. 399.

Per Spragge, V. C., McDonald v. Reynolds, 14 Grant, 693.

<sup>)</sup> See Scott v. Scholey, 8 East, 467.

Bank of Upper Canada v. Brough, 2 Err. & App. Rep. 95.

See 27 Vic. ch. 15; Lowell v. Bank of Upper Canada, 10 Grant, 75; per Burns, J., in Levisconte v. Dorland, 17 Q. B. U. C. 442.

Heward v. Wolfenden, 14 Grant, 188.

Donovan v. Bacon, Chancery U. C. 1869, not yet reported.

under, and not by reason of collateral facts ( the ge. it (a).

incumntion itor on should proper innation as moumbran-, or sale ght be set

ide.

aser lia-

The purchaser should, by reason of his liability off incumbrances (b), ascertain their nature and a on the other hand, the execution creditor must so as that, from want of proper information, the sale not be prejudiced, as in such case the sale might aside (c). If he is not aware of the nature and of incumbrances, it would be a wise precaution in enquire of the execution debtor, giving notice of th with a view to weaken the case of the debtor of filed to set aside the sale if he withheld the inform

If a mortgagee purchase, the mortgage debt against the mortgagor and his representatives and liable as sureties for the mortgage debt be rega satisfied, and to an action for the debt it would se ordinary plea of payment would suffice, though no under the act had been given (d).

Merger, &c.

The question of merger, and of the right of the pr to keep alive satisfied mesne incumbrances has been of (e): other points are treated of in considering sa' executions.

CON. STAT., CH. 22, SEC. 261.

As to seizure by sheriff of mortgage.

461. The sheriff or other officer, having the execu writ of fieri facias against goods sued out of either c rior Courts of Common Law, or out of any Co or of any precept made in pursuance thereof, shall sei or bank notes (including any surplus of a former exe the debtor), and any cheques, bills of exchange, probonds, mortgages, specialties or other securities for ! ing to the person against whose effects the writ of

<sup>(</sup>a) Fitzgibbon v. Duggan, 11 Grant, 188; McCab Grant, 175.

<sup>(</sup>b) See Pegg v. Metealf, 5 Grant, 628, as to the effe cases ante pp. 350, 351, 352.

<sup>(</sup>c) Ferguson v. Duggan, 11 Grant, 183; McDona Grant, 84; Bebec Tokai Sherob v. Belgar, 6 More Jones v. Jones 15 Grant, 40; and ante p. 330; post

<sup>(</sup>d) Woodruff v. Mills, 20 Q. B. U. C. 51.

l, and shall pay or deliver to the party who sued out the tion, any money or bank notes so seized, or a sufficient part of, and shall hold any such cheques, bills of exchange, prory notes, bonds, specialities or other securities for money, as Money seized with or securities for the amount by the writ and indorse to be paid over to party thereon directed to be levied, or so much thereof as has not taking out the otherwise levied or raised, and such sheriff or other officer execution.

ue in his own name for the recovery of the sums secured by, when the time of payment thereof has arrived. 20 Vic.

e corresponding Imperial Act does not extend to mort.

Though the Provincial Statute expressly names gages as regards authority to seize, and makes no Interest of ion of them as regards holding and suing, still this will mortgagee may be reached the right to hold or sue (a).

de by seising the mortgage, he can nevertheless attach the mortgage ing mortgage debt.

execution will not bind the interest of the mortgagee Execution its delivery to the sheriff, but only from seizure of the from seizure. Fage (b).

e covenant for repayment is not essential to the va-Covenant for of a mortgage, for it may well be that the land alone payment, form the security, and that the mortgagor shall incur not essential resonal liability; consequently, in the absence of the lant, or some evidence apparent on the face of, or obligation to dehors, the mortgage, that a loan was in fact made or repay if no decedent debt existed, no action would lie against the gagor to recover the amount. In one case (c) wherein lortgagee was seeking to recover from the mortgagor, the covenant was omitted, and there was the usual so for redemption and total absence of any evidence to a loan or antecedent debt, the consideration in the

Bank of Upper Canada v. Shickluna, 10 Grant, 157. Smith v. Bernie, 10 C. P. U. C.

Hall v. Morley, 8 Q. B. U. C. 584; see also Pearman v. Hyland, B. U. C. 202.

mortgage being expressed to be money paid by the mortgage to the mortgagor, the law on the subject is thus laid down, "We think it clearly appears that in order to furnish ground, for an action at law to compel payment of the mortgage money, there must be something beyond the mere proviso in the deed, which is simply a defeasance and nothing more. If there is no engagement expressed to pay the money, there must at least be what Lord Denman speaks of in Yates v. Aston (a), some proof of an advance made at the request of the mortgagor, for the mortgage itself certainly does not import that."

The covenant for payment prior to the 29 Vic. ch. 28, sec. 28, gave the mortgagee the benefit of priority over simple contract creditors in administration of assets, and time of bar by the Statute of Limitations is extended to twenty years.

The covenant should be in favor of the personal not the real representatives of the mortgagee, the former being entitled to the money, though the legal estate would descend to the latter. It is collateral to and does not run with the land as a covenant for title, but stands on the footing of a chose in action; and consequently on an assignment of the mortgage, the assignee must sue in the name of the mortgagee.

Limitation to recovery of interest.

Interest more than six years over due ceases to be a charge on the land by Con. Stat. ch. 88, sec. 19; but by Con. Stat. ch. 78, sec. 7, the personal remedy by action on the covenant continues for the interest and principal for twenty years (h). Apart from the Statute of Limitations, after expiry of twenty years non-payment and possession by the mortgagor, a presumption arises of payment and re-conveyance of the mortgaged estate to the mortgagor; but it has been held that the presumption did not exist, where the mortgage deed contained no redemise to the mortgagor and the land was vacant on execution of the deed (c). A place

Presumption of payment and reconvey ance.

<sup>(</sup>a) Yates v. Aston, 4 Q. B. 182.

<sup>(</sup>b) Sinclair v. Jackson, 17 Bea. 405; see post p. 386 as to tacking terest to principal as against the heir though more than six years over and resisting redemption unless all arrears are paid.

<sup>(</sup>c) Mahar v. Fraser, 17 C. P. U. C. 408, A. Wilson, J., diss.

ayment is seldom specified, though the so doing, or the ng the right to deposit in some bank to the credit of the tgagee might in some cases avoid the necessity of peril legal tender to him.

he covenants for title are the same as in ordinary pur- Covenants for e deeds, except that the covenant for quiet enjoyment ade to take effect only after default in payment of the tgage money. The covenants also are not limited as in of an ordinary purchase to the acts of the grantor: has been complained of on the ground that the result ter foreclosure or sale under a power of sale in the tgage, that the mortgagor continues liable more extenly on his covenants which run with the land, than if he sold the estate in the first instance; no doubt this is on the other hand, if through defect in title, the morte lost the security of the land on recovery by a stranthrough some defect in title not occasioned by the tgagor, and the covenants for title were limited to his the mortgagee might be in a very precarious position in the day appointed for payment of the principal money e distant; whereas, if the covenants were general, he ht sue on them at once in such case without waiting for day appointed for payment, and the measure of damages ild be, it is apprehended, the amount of the loan, for the tgagee is entitled to what he stipulated for viz. the rity of the land, and failing that, to be reinstated and return of his money.

surance policies against loss by fire, or against the death Fire insurie mortgagor, frequently form a most important part of ance ecurity in a mortgage; as where the chief value of the erty consists in buildings in the one case, or the mortr should have but a life or limited interest in the prov in the other.

ojections are frequently made to lending on property re fire insurance is essential to the sufficiency of the rity. This arises from the risk of the policy being void s inception from improper description of the property red, or from other inattention to important particulars. or becoming vitiated after its creation on violations of the conditions by increase of risk or otherwise. gee also is frequently put to expense and trouble on a loss In very many cases when a loss occurs, the insurance company is not legally liable, and it is more than probable that if mortgagees and others insured were now to examine the conditions endorsed on their existing policies, and the facts attendant on and subsequent to the insurance, they would find that their only security rested on moral obligation, or the fact that the companies know well that it is not to their interest to insist on strictly legal ob-On this Lord St. Lemards says (a). "Very few policies against fire are so framed as to render the company legally liable, generally the property is inaccurately described with reference to the conditions under which you insure. They are framed by the company, who probably are not unwilling to have a legal defence against any claim, as they intend to pay what they deem a just claim, without taking advantage of any technical objection, and tomake use. of their defence only against what they may believe to be a fraud though they may not be able to prove it." on to mention the difficulty he had in endeavoring personally to effect a proper insurance. In practice it is not usual for the mortgagee to enquire into the validity of the insurance effected by the mortgagor.

Distinction between fire and life assurance; the former a mere personal contract of indemnity. There is this distinction between an insurance against loss by fire and an insurance on a life, viz., that the latter, is a contract to pay a fixed sum, and at least where a man insures his own life, quite independent of any question of indemnity or loss consequent on death, whereas the former is strictly a personal contract for indemnity to the insured against loss, and does not extend beyond the amount of loss (b).

Fire insurance ceases on conveyance The consequence is, that where the insured absolutely conveys the property insured, the policy ceases to be effect.

(a) Handy Book, 5 ed., p. 46.

<sup>(</sup>b) Dalby v. India and London Assurance Company, 15 C. B. 365; Smith Lg. Ca. 5 ed. 233, 239, 249.

. for the insured can suffer no loss as to property not by insured and in order that in such case, the policy if assigned, without conild continue effectual, the consent of the insurers should surer, btained on the assignment (a). This it will be observed lite independent of any conditions of the policy, which Ily expressly provide that on any transfer of the prov or of the policy, the consent of the insurers shall be ined and signified in some particular way.

s however upon a mortgage, an interest is still left in unless conmortgagor, a transfer by way of mortgage would not, way of mortould seem, be within the principle above alluded to gage. icable to absolute transfers, and an action might still istained in the name of the mortgagor, unless indeed conditions of the policy vitiated it on assignment withconsent (b). Frequently it will be found the condis of a policy are so worded as in strictness to render a ent of a particular nature to the proposed transfer isite before the transfer, and that further notice of it ld be given after it actually takes place: and even gh the insurers consent to an assignment of the policy Action on poiven, and it expresses itself to be an indemnity to the liey cannot be in name of red and his assigns, still an action must be brought on assignee. loss in the name of the insured and not of his assignee. the general principle that a chose in action is not

an existing policy be assigned the covenant to keep Covenant to so long as any moneys remain due, should contain a keep up inlation to pay the annual premium requisite so to do, two iree days at least before the policy would expire, and uce the receipt on demand: this gives time to the morte after default to pay, or insure himself before the ey expires. It should provide also that the mortgagor do or suffer nothing whereby the policy may be ted, and that thereon or on any default by the mort-

 $\mathbf{mable}(c).$ 

Sadlers Company v. Badcock, 2 Atk. 557; Lynch v. Dalzell, 4 P. C. 431.

<sup>2</sup> Davidson Conv. 2 ed. r. 542.

Beemer v. Anchor Assurance Company, 16 Q. B. U. C. 485.

gagor in keeping up the policy, the mortgagee may keep up the insurance or otherwise insure, and that the premiums so paid shall be a charged on the land.

Objections to interim receints for insurance.

It frequently happens where there is no policy in existence, and time is of importance, that the mortgagor effects an insurance, and as some delay necessarily ensues before the policy can issue, he takes what is termed an interimreceipt not under the corporate seal of the company, expressing that the property is insured and that a policy will be issued and the lender accepts the mortgage and rests satisfied with an assignment of this receipt. This is a course which may lead to difficulty, not only because when the policy subsequently does issue if in favor of the mortgagor, it may perhaps be requisite to go through further formalities as to its assignment. (to avoid which it is advisable to insure in the name of the mortgagee), but also because at law at least, on any loss happening before the policy issues, the company has been held not to be liable to pay the loss (a), on the general principle that corporations cannot contract except under their corporate seal. In any such event the company might be compelled in equity to make good their contract, and pay the loss (b): at law also an action would lie on a refusal to issue the policy (c); and as to executed contracts of corporations within the scope of their business and authority of which they have received the benefit, the tendency of recent cases is to relax the rule under which they were held not liable on the grounds of absence of the corporate seal (d).

Absence of corporate seal.

Cases where

If the mortgagee should insure at his own expense, withmortgagee in- out having any right under the mortgage deed or otherwise suring may retain the mo- to recover the premium from the mortgagor, then he is

<sup>(</sup>a) Jones v. Provincial Insurance Co., 16 Q. B. U.C. 477.

<sup>(</sup>b) Penlay v. Beacon Assurance Co., 7 Grant, 130.

<sup>(</sup>c) Jones v. Provincial Insurance Co., 16 Q. B. U. C. 477, per Robinson.

<sup>(</sup>d) Pim v. Municipal Council Ontario, in appeal, 9 C. P. U. C., 384; Whitehead v. Buffalo & Lake Huron Railroad Co., in appeal, 8. Graph 157.

d as having insured for his own benefit, and not for neys on loss e mortgagor, or of the estate, and could retain the plying on the money and also recover the mortgage money mortgage. any deduction: and in this respect he stands on e same footing as a lessor insuring under like cires (a).

t. 14 Geo. 3. ch. 78, s. 83, is to the effect that the 14 Geo. 3. ch. companies, on the request of any person interes- 78, s. 83, as to compelling operty destroyed or damaged by fire, or on any insurance of suspicion shall cause the insurance money to be companies to n rebuilding or reinstating the property, unless perty instead xty days after adjustment, the parties give suffi- insured. rrity to to the company that the money shall be so or a settlement be come to among the parties to action of the company. It has been held (b) that on applies here, and it follows that though as above mortgagee insuring for his own sole benefit with-

son v. Land, 8 Hare, 216.

on v. Pennock, 14 Grant, 604; see also Re Barker, 34 Law. J. The Stat. 14 Geo. 3, ch. 78 repealed the Stat. 12 Geo. 3, ch. The repealed act is not s passed for much the same object. in most of the editions of the statutes at large, but that act n sections applying expressly to certain specified limits of the s of mortality, goes on to enact in precisely the same words 33 of 14 Geo. 3, except that in this section 83 are left out h are inserted in the corresponding section of 12 Geo. 3., viz., le limits by this act (12 Geo. 3), prescribed." The inference ren the Legislature re-enacted in the same words as the repealed only that they omitted the words which confined the operation ner act, that they did not intend the new act should be so conat this is a fair and strong argument may be gathered from the in ex parte Copeland, 3 De G. M. & G. 914, and the King v. Burr. 448; in the latter case Lord Mansfield says "where ifferent statutes in part materia, though made at different ven expired, and not referring to each other, they shall be taken aed together as one system and as explanatory of each other. ver a general principle that in construing a statute the old law nsidered. From the title of the act 14 Geo. 3, it might be infer-e whole act was limited in its operation; but the title is no tatute, and not to be regarded in its construction, (Bac. Ab. 12); moreover it has been held that sections 84 and 86 al and in force here. It must however be admitted that writers in stating that a covenant to insure runs with the land eir remarks to cases within the Bills of Mortality, whilst others rth of saying that beyond those limits the covenant would not on Covenants 183., Woodfall Land. & Tenant 9 ed. p. 545., n. Conv. by Sweet, 3 ed. 426.

out any right to charge the premium against the nortegor, would be entitled to the mortgage money without deduction on account of any insurance money received on a loss, still practically the mortgagor by application of this section can get the benefit of the insurance by requiring the moneys to be expended on the estate: so also on the other hand in the same way a mortgagee might obtain the benefit of a policy not assigned to him effected by a mortgagor.

Mortgageeentitled to have insurance money payable to mortgagor laid out in reinstating property.

Apart even from the operation of the above act, it is said that though there were no assignment of the policy or any agreement in regard to it, a mortgagee would still be entitled in equity to insist on the insurance money accruing on any loss being laid out in reinstating the property, provided the insurance existed at the time of the mortgage (a).

Covenant to

The section of the act above referred to being general in insure runs its application, it seems that a covenant to insure would run with the land? with the land in favor of assignees, though beyond the limit of the bills of mortality, as being a covenant which by force of the act which requires the insurance money to be laid out on the premises on request of any person interested, directly affects the land; and it is said that apart from the operation of the act, on general principles the covenant would also run, especially if the insurance money is to be laid out in reinstating the premises (b).

If a policy be assigned, and loss under it the moneys are to be applied.

If a policy be assigned, and nothing said as to how, in the case of loss, the insurance moneys are to be applied, happens, how then if the mortgage moneys be not payable on the loss happening, the mortgagor is entitled to have the insurance moneys received by the mortgagee applied in reconstruction of the property. The mortgagee is not compellable against his consent to apply them in reduction of his mortgage before it becomes payable, nor to invest them for the benefit of the mortgagor; neither is he himself entitled, without

<sup>(</sup>a) See Davidson on Conv., 2 ed., vol. 2., p. 541, referring to 6 den v. Ingram, 23 L. J. Ch. 478, per Ld. C.

<sup>(</sup>b) Per Best, J., Vernon v. Smith, 5 B. & Al. 1. Woodfall Land & Tenant, 8 ed. 545. See contra Platt on Covenants, 185. Byth. & Jan. Conv. by Sweet, 3 ed. 426.

westment; or (at least if not in possession) in reconstrucon of the mortgaged premises; on the other hand, should be mortgagor withold his consent to reconstruct, the wneys can remain idle in the hands of the mortgagee, who ill not be, before the mortgage become payable, be charged ith interest on them, or be liable to any deduction of incipal or interest on his mortgage (a). The principle be applied is that the insurance moneys represent the operty.

Some of the following observations in regard to assurance lives, equally apply to assurance against loss by fire; ch as in regard to the concealment or misrepresentation facts which will vitiate the policy, the notice of assignent requisite, &c.:

Policies of insurance on a life or lives frequently form a Life insurbstantial part of the security on a loan, where the bor-ance.

wer has but a limited interest in the lands offered as curity, as where he is tenant for his own life, or purutre vie. So also where a life policy has been a long time axistence, and thus become valuable by accumulated onuses, or the advanced age of the assured, the policy lone, if assigned with proper covenants and powers to he assignee, may form adequate security for a portion of a value.

A policy of insurance on a life is a contract, based on ratin representations as to health, age, &c., and subject to ratin conditions as to place of residence, &c., between the surer and the insured, that the former will pay a certain sed sum on a given event, as the death of a named person, consideration (as one of the conditions) of certain fixed ratio or other payments to be made to the insurer. The ove is the simplest form of insurance, and the contract by be more complex as the circumstances of the case by require

It has before been mentioned (b) that the contract is to not a contract y a fixed sum at all events, and is not, as is an insurance of indemnity.

a) Austin v. Story, 10 Grant, 306.

<sup>(</sup>b) p. 362.

against loss by fire, in the nature of an indemnity to the insured against loss, but quite irrespective of any such question, except so far as it may be governed by Stat 14. Geo. 3 ch. 48.

That statute 14 Geo. 3, ch. 48, based on the policy of not

14 Geo. 3, ch. 48, restrains insurance to of the policy.

allowing any one to have a pecuniary interest in the death amount of in- of another, prohibits insurance on any life wherein the interest in the life at the date sured has no interest, and provides also that where the insured has an interest, no greater amount shall be recovered than the value of such interest at the date of the policy. If the insured had an insurable interest at the date of the policy, he can recover to that amount, though it should have ceased on the happening of the death insured against on the principle above explained that the contract is not one of indemnity (a): if the insurance should exceed the interest, the policy is not void, but good pro tanto (b). interest must be a pecuniary one, (c.) but every one has an insurable interest in his own life.

Misrepresentation.

A policy is based on representations made as to age, health and other material particulars; most policies provide that any erroneous representation shall vitiate the policy, and in such case the materiality of such representation is not to be considered (d). Wilful misrepresentation or suppression, of a material fact, would vitiate the policy apart from any express condition to that effect (e). In most instances also the policies are liable to be avoided on certain named contingencies, as if the party whose life is insured should travel beyond certain specified limits, &c.

The policy a chose in action.

The policy being a chose in action is not assignable at law, so as to give the assignee a right of action in his own name; any action for the sum insured must be in the name of the insured or his personal representatives, even though

<sup>(</sup>a) Dalby v. India Ins. Co., 15 C. B. 392. 2 Smith, Lg. Ca. 6 ed. 246 overruling Godsall v. Boldero. (b) Ib.

<sup>246</sup> overruling Godsall v. Boldero. (b) Ib.
(c) Von Lindenau v. Desborough, 8 B. & C. 586. Morland v. Isaac 38
Beav 389; see further as to insurable interests Bunyon on Life Isaac rance 14.

<sup>(</sup>d) Anderson v. Fitzgerald, 4 H. L. Ca. 484.

<sup>(</sup>e) Beemer v. Auchor Ins. Co., 16 Q. B. U. C. 485, a case of policy.

expressed to be made with assigns (a): for the same reason also, as will be presently explained, notice to the insurer of transfer of the policy is all important.

From the above remarks may be gathered the matters deserving attention on the assignment of a life policy. a preliminary step, enquiry should be made of the insurers, as to whether the policy is still subsisting, and whether they have received any notice of any prior transfer. general rule the assignee, from difficulty of enquiry into the facts, has to run the risk of the policy being invalid by reason of errors, or misrepresentation in the particulars on which it is based.

The assignment, if by way of mortgage, may be coupled Form of aswith the grant of the land mortgaged, and the same with life policy. regard to the proviso for redemption. It should give power to sue in the names of the personal representatives of the insured, and to give receipts (b); the trusts should be declared of the moneys to be received, being to pay expenses, then the mortgage debt, and the surplus to the mortgagor. The covenants of the mortgagor will be not only to pay requisite premiums, and produce receipts, but not to do or suffer anything whereby the policy or any future policy may be avoided; that if it becomes voidable he will do all things requisite to restore it; that if it becomes void he will reinsure in the mortgagee's name; that on default by mortgagor in regard to insurance the mortgagee may insure and pay premiums, and the mortgagor will repay and the expenses, and till re-payment the moneys shall be a charge on the lands and the policy. There should be a power to sell or surrender any policy, with the usual clauses exonerating the purchaser from seeing as to the regularity of the sale; the trusts of the insurance money should be declared; and the mortgagee declared not to be liable for involuntary The frame of some of these trusts and declarations will be referred to hereafter in considering power of sale

<sup>(</sup>a) Carter v. Boehm, 3 Burr. 1905; 1 Sm. Lg. Ca. 6 ed. 490, in notes.

<sup>(</sup>b) Brasier v. Hudson, 9 Sim. 1.

of the land mortgaged, and the trusts of the purchase monev.

mediately be given; this depends on the principle that as

After the assignment notice to the insurers should im-

Notice of assignment of policy should be given.

or a second assignee first giving notice may gain

the debt. or chose in action assigned, is not canable as a chattel of actual delivery, still it must be rendered as complete as the nature of the transaction will allow, which is said to be, delivery of the security, if any, and notice to the Therefore a subsequent assignee of a chose in debtor (a). action may obtain priority by being the first to give notice to the party liable; if such subsequent assignee, however had notice of the prior charge at the the time of assignment, then of course he would gain no priority (b). an extent is the effect of notice carried that it would seem. that, even where the first assignee obtains possession of the policy, but omits to give notice, and a subsequent assignee has his enquiry for the policy evaded by the assignor or even acting bona fide, makes no enquiry, he will, being the first to give notice, generally be preferred (c). It is manifest also that in the absence of notice, the party liable to pay might

or payment made to assignor.

priority.

Notice of outstanding interests in personalty should be given,

not requisite as to real estate.

**i.** \_

The doctrine of notice both as to determining priorities assignment of and also in excluding the operation of the reputed ownership clauses hereafter referred to is not, of course, confined in its operation to policies of assurance, and other choses in action, but may be stated generally as applying to almost all dealings with reversionary or other partial interests and other outstanding rights and expectancies in personalty.

pay the insured, or original creditor, and thus the assignee be defeated; so also the policy might be surrendered.

It does not apply however to equitable interests in real cstate, that is, where the interest is existing in real estate which continues its character as such, and has not by direction to convert or otherwise assumed the character of mere

<sup>(</sup>a) Jones v. Gibbon, 9 Ves. 410; In re Birch 2 K. & J. 332; Dearb v. Hall, 3 Russ. 22, and see generally Ryall v. Rowles, 2 White & Tal., Lg. Cas. Eq. 3 ed. 670 et seq.; 2 Davidson on Conv. 2 ed. 484, n. c; 488.

<sup>(</sup>b) Bunyon Life Ass. p. 180.

<sup>(</sup>c) Bunyon Life Ass., 182, 184; Stocks v. Dobson, 17 Jur 223.

ersonalty only, as for instance, trust money directed to be vised out of a sale of real estate, and so that it could only each the party entitled as money (a).

There is also apart from the above considerations, the Necessity for ct that under the English Bankruptcy Acts (b), the notice to avoid ersonal as well as the real estate situate here of a per-assignor still on who under them is adjudged a bankrupt becomes vested being deemed reputed owner the assignee in bankruptcy, and liable to the satisfaction Under what are called the reputed ownersin clauses of these statutes, if the bankrupt at the time his becoming so, have in his possession order or disposion with the consent of the true owner, any goods or pattels whereof he was reputed owner, or had taken on imself the sale, alteration or disposition as owner, the me become liable to satisfy the creditors in bankruptcy.

on. St. ch. 18. s. 10. (8 Vic. ch. 48) has a clause to the same Con. Stat. ch. fect, and though it refers only in terms to goods and chat- 18, sec. 10. ds, yet choses in action are thereby included (c).

Under these reputed ownership clauses of the English cts, it has been held that policies, (d) bonds and other somes in action (e) are within the meaning of the acts. nd pass to the assignees in bankruptcy in the event of gligence in giving notice to the party liable, at any te, if there be evidence of continued reputed ownership v the bankrupt; but it has been laid down that without me such evidence to bring the case within the act, mere sence of notice by the assignee of a policy is not conusive against him (f).

<sup>(</sup>a) Re Hughes, 33 L. J. N. S. Cha. 725; Jones v. Jones, 8 Sim. 633; ilmot v. Pike. 5 Hare 14; Lee v. Howlett, 2 Kay & J. 531.

<sup>(</sup>b) 12 & 13 Vic., ch. 106; 24 & 25 Vic. ch. 134, ante p. 20.

<sup>(</sup>c) Ryall v. Rowles, 1 Ves. Sr. 348; 2 W. & T. Lg. Ca. Eq. 3 ed. 670 (d) Faulkner v. Case, 1 Bro. C. C. 125; Gale v. Lewis, 9 Q.B. 730.

<sup>(</sup>e) Ryall v. Rowles, 1 Ves. 384 supra; Belcher v. Bellamy, 2 Ex. 303; rrn v. Baker, 9 East, 215; 2 Smith Lg. Ca. 190 in notis and cases there ed; see also Gibson v Overbury, 7 M. & W. 555.

<sup>(</sup>f) Exparte Cooper, 2 M. D. & De G. 23; Exparte Heathcote, 2 M. D. De G. 711; Ex parte Rose, 2 M. D. & De G. 131; Edwards v. Scott. M & G. 962.

For the transfer of the legal estate of the mortgage at Power of sale. law no power of sale is requisite, and the assignee or vendee will take subject to such rights as may be subsisting in the mortgagor, or those who claim under him, of possession, redemption, or otherwise (a): and thus a sale and conveyance of the estate by the mortgagee to a vendee, though made professedly as on a power of sale in the mortgage, is valid to pass the legal estate of the mortgagee, even though no power of sale existed, or were improperly exercised; and when the mortgagor's right to possession is gone, the vendee can maintain ejectment; he occupies in fact the position of assignee of the mortgage (b). The chief object of the power is to enable the mortgagee or other party claiming through him to sell and convey the property free from the equity of redemption of the mortgagor, and of all claiming through him subsequent to the mortgage, whether by express charge or by execution, or otherwise, and thus avoid the expense of proceedings in Equity to foreclose or sell.

The power of sale is now very commonly made use of, and although at first sight its insertion may appear prejudicial to the interests of the mortgagor, yet in truth it is not so, if only to be exercised on reasonable notice after default and at public auction. The absence of such a power may be very prejudicial to the interests of both mortgagor and mortgagee, where the equity of redemption becomes incumbered by executions or otherwise, as on a suit for foreclosure or sale the incumbrancers have to be made parties, sometimes at great expense. As regards any objection on the ground of possibility of improper exercise of the power by an individual, which could not happen on sale under direction of the court, it will be seen in the sequel that a Court of Equity by application of the principle

(a) See post p. 388.

<sup>(</sup>b) See Nesbitt v. Rice, 14 C. P. U. C. 409.

the mortgagee is trustee for the mortgagor, will closely tinize his conduct, and, if improper, afford relief.

he power of sale should be given to the mortgagee, power of sale executors, administrators and assigns: it should not given to personal to be given to personal personal representatives.

iven to heirs instead of the personal representatives, sonal not the real representatives, and the heirs are tatives.

the parties to convey the legal estate vested in them, ch they hold as trustees for the parties entitled to the 1848, in which latter they may be in no way insted.

he word "assigns," as referable to the mortgagee, The power ald never be omitted, for in its absence it is said (a) to assignees. assignee of the mortgage could not exercise the power ale (b), and that it may be doubtful whether a devisee

he power should not be made conditional on notice Frame of ng given, but if any notice is to be given, it should be power as to vided for by a separate covenant by the mortgagee not ell till after the specified notice (d).

s regards the clause or covenant providing that notice Notice to given before sale under the power, it is said (e) that it assigns. ery advisable to omit the word "assigns," as referable he mortgagor, from the clause requiring notice. If assare to receive notice, ample scope may however be n as the mode of giving notice, and it should be product that the notice need not be personal, but may be on the premises, and need not be addressed to any

<sup>)</sup> Byth. Jar. Con., by Sweet, vol. 5, p. 105; but it is to be observed the cases referred to which are named in the two next following notes cases of trustees and trusts for sale, and not of a mere mortgage with wer of sale. In a case of a trust created, it is clear the trust cannot elegated, for it implies a personal confidence in the party named; arther, Lord Braybroke v. Inskip. Tudor Lg. Ca., 2 ed. pp. 890, et in notis.

<sup>)</sup> Bradford v. Belfield, 2 Sim. 264; see last note.

<sup>)</sup> Cooke v, Crawford, 13 Sim. 91; Wilson v. Bennett, 5 De G. & 475; Stevens v. Austen, 7. Jur. N. S. 873; Macdonald v. Walker, 3ea. 556; see also Ridout v. Howland, 10 Grant, 547.

<sup>)</sup> Forster v. Hoggart, 15 Q. B. 155; see post pp. 375; 424, n. i.

<sup>)</sup> Dart Vendors, 3 ed. p. 45 note r.

Notice of Sale, person by name or designation, or may be sent by not addressed to the party at the post office next his residence. In one case (a) the power of sale was conditional on default and notice in writing to the mortgagor, his heirs, executors, administrators or assigns, or left at his or their last or most usual place of abode, requiring payment; it was held that notice to the mortgagor alone was sufficient, and that it was well served by fixing it on the door of a house, alleged to have been his last known place of abode; at least that the onus was thrown on the parties objecting to the sale that something more should have It was also held that it was not requisite to prove that the mortgagor was alive. This case has been referred to as warranting the proposition, that in case of an assignment of the equity of redemption, notice need not be given to the assignee, but it hardly warrants so broad a statement: it was a case (to put it simply) of a conveyance from W to S, declared void as against the creditors of W in a suit at their instance, but it was good as regarded a subsequent bona fide mortgagee for value from S: it was insisted the creditors should have had notice, and that the notice as served was insufficient. It will be observed the creditors did not stand in the position of assignees of the mortgagor, they did not claim under, but in fact paremount to the mortgage, and therefore the case perhaps, is hardly an authority that the notice would have been good if there had been an assignee. wherein the mortgage provided that no means should be taken by the mortgagee to obtain possession till he should have given a month's notice in writing after default demanding payment, it was held on ejectment brought by the mortgagee that a notice signed by his attorney on record in an action on the covenant in the mortgage to recover the mortgage debt, a month prior to the ejectment, in which action the same attorney was also attorney be record was sufficient, and that no proof need be given of the authority of such attorney (b).

<sup>(</sup>a) Major v. Ward, 5 Hare, 598.

<sup>(</sup>b) Keyworth v. Thompson, 16 Q. B. U. C. 178.

It is important to provide that any sale by the mortga-Clause providing for validity of sale wing the former personally liable for improper conduct, in any event any; and that the purchaser shall not be bound to entire as to whether notice has been given, or default ade, or otherwise as to the validity of the sale: in the sence of such a clause the mortgagee selling may have metimes difficulty in enforcing the sale against an unlling purchaser (a). But such a clause will not protect purchaser who has express notice that the notice of e stipulated for has not been given (b).

The power usually authorizes a sale by private contract Frame of at public auction, for cash or on credit, in whole or in power of sale.

s, from time to time, under any special conditions of as to title or otherwise, with power at any sale auction to buy in and re-sell without being response for any loss or diminution of price occasioned reby, and to rescind or vary any contract of sale that y have been entered into (c).

On any sale under the power, the vendor must be careso to act as that the interests of the mortgagor be not duty of
judiced by any negligence or misconduct. The duty of mortgages.
nortgagee on sale by him resembles that of a trustee for
(d) though perhaps a greater latitude may be allowed
a mortgagee than to a bare trustee not interested in the
occeds, and the court might restrain a sale by a trustee
der circumstances in which they would not restrain a
ortgagee (e). It is more advisable of course, to avoid any Mode of sale.

a) See Hobson v. Bell. 2. Bea. 17.

b) Parkinson v. Hanbury, 8 W. R. 575.

<sup>(</sup>e) As to the object and necessity for these provisions, see Jarman th Conv. by Sweet, 3 ed. vol. 5, p. 412; Davidson Conv. vol. 2, 568, 2 ed.; Dart Vendors, 3 ed. pp. 34, et seq.; Lewin Trusts, 5 · 431; Ante p. 44, note referring to ex parte Lewis.

d) Richmond v. Evans, 8 Grant 508; Latch v. Furlong, 12 Grant, per Mowat, V. C. See also ante. n. c.

e) As to cases wherein the court declined to interfere; Matthie v. rards, 11 Jur. 761; Kershaw v. Kalow, 1 Jur. N. S. 974; see also there v. Equitable Society, 4 Jur. N. S. 1214.

Duty of ven-

ground of complaint of insufficiency of price or of unfair sale, that the property should be sold at public auction. instead of by private contract, even though the power authorize the latter. In one case where the mortgage expressed a desire to get his debt only, and made no effort w sell, and never having advertized, sold at private sale at s great undervalue, the sale was set aside, though it did not appear that the purchaser was aware of the negligence of the mortgagee (a). Due notice by advertisement of the intended sale should be given, and perhaps as to this the practice which governs on sales by the direction of the Court of Chancery would be the safest guide. Unnecessary and too stringent conditions of sale as to title and production of title deeds or otherwise should be avoided as likely to prejudice the sale; and if in this, or other respects the conduct of the mortgagee be improper, not only

Cases where sale set aside as improperly conducted.

Value of improvements allowed.

will be be held responsible, but under circumstances the sale may be set aside (b): but the circumstances must be very strong to induce the Court to set aside a sale as agains a purchaser acting bona fide (c), and if the sale were set aside as against such purchaser, he might be allowed for his improvements (d).

Con.St. ch.87.

The right of the mortgagee under Con. Stat. ch. 87, right of mort-gages to pur- purchase himself on sale under the power was before conchase himself. sidered (e): as regards the right so to purchase apart from the statute, it is quite clear that a mortgagee has no suc right, and that notwithstanding any such purchase, he will still continue mortgagee, and liable to redemption. mortgagee stands as above remarked, much in the position

<sup>(</sup>a) Latch v. Furlong, 12 Grant, 303.

<sup>(</sup>b) Richmond v. Evans, 8 Grant, 508. Jenkins v. Jones, 2 Law N. S., 128; Latch v. Furlong, 12 Grant, 303, aute n. a; McAlpine v. Young, 2 Chan. Cham. Rep. 171; and ante pp. 330, 358. As to depression tory conditions, see Davidson Conv. 3 ed. vol. 1, p. 441; Sag. Vend. 19 ed. p. 53; Dart 3 ed. p. 34.

<sup>(</sup>c) See p. 375, n. e.

<sup>(</sup>d) Carroll v. Robertson, 15 Grant, 173.

f a trustee for sale; his duty as vendor is to obtain as such as possible for the property, his interest as purchaser the reverse of this, and that the property shall sell for as Courts of Equity forbid a man w a price as possible. acing himself in this position, wherein his interest may nflict with his duty. So jealous are the courts in allowg the mortgagee to deal with the interest conveyed to m, that at one time it seemed questionable whether where Mortgagee ie mortgagee should purchase on a sale for taxes the lands may buy in the estate for ortgaged, he would not still hold them as mortgagee, and taxes. liable to redemption on the terms of the mortgage (a). nd where a mortgagee bought the equity of redemption Purchase from ider pressure of an insolvent mortgagor, at considerably mortgagor uns than its value, the purchase was set aside at the stance of the assignee in bankruptcy of the mortgagor (b). has been held however, that a second mortgagee buying second morte legal estate on a sale by the first mortgagee, under a gagee buying estate on sale Wer of sale in his mortgage, takes the estate as any by prior mortanger, free from the equity of redemption (c). But if gagee. mortgage of the second mortgagee be in trust for sale default, instead of with the usual power of sale, so that nortgagee stands more in the position of a trustee, then Cannot purchase from a prior mortgagee, but will conue to be trustee as regards the property purchased (d). As a general rule the trusts of the proceeds of any sale Application of

buld, after payment of the mortgage debt and expenses, surplus prodeclared in favor of the mortgagor and his heirs, and not

favor of his personal representatives, unless indeed the "tgage be of leasehold property. Whoever has the right redeem, is the person who is entitled to the residue of property left unsold after satisfaction of the mortgage

Smart v. Cottle, 10 Grant, 60, per VanKoughnet, C.; Scholfield v. inson, 10 Grant, 226—that on such purchase he can hold abso-Jy, see Kelly v. Macklem, 14 Grant, 29.

<sup>6)</sup> Ford v. Olden, Law R. 3 Eq. 461; see also Webb v. Rorke, 2 Sch. ⊶ef. 661.

C) Shaw v. Burny, 11 Jur. N. S. 99; Parkinson v. Hanbury, 13 W. 331; Watkins v. McKellar, 7 Grant, 584; Brown v. Woodhouse, 14

<sup>(</sup>d) Parkinson v. Hanbury, 8 W. R. 575; 1 Drew & S. 143; 13 W.R. 331.

debt, and to the surplus proceeds if all be sold. If the mortgagor does not intend this, but intends a conversion in the event of a sale, and that the proceeds shall go as personal estate, then that should be clearly expressed; for when there is a mere power and not an absolute trust for sale, and a sale take place after the death of the mortgagor, the surplus proceeds will go to the heir, even though the trust of them be declared in favor of the personal representatives (a). On a badly drawn mortgage by inattention to the above, the mortgagee may frequently be misled into payment to Where a sale is had in the lifetime of the wrong party. the mortgagor, the surplus proceeds will go to personal representatives on his death before payment: the general principle is, the property or its proceeds will where there is a mere power of sale, go to real or personal representatives, according to the state in which it was on the death of the mortgagor.

As to garnishing surplus proceeds of sale.

When the mortgagor had by the terms of the mortgage a remedy at law for the surplus proceeds of the sale, and not a mere right in equity to call on the mortgagee to account for them, Draper. C. J., gave an order in Chambers (b) at the instance of a judgment creditor of the mortgagor to garnish such surplus, although it appeared that other judgment creditors were prior as regards registry of their judgments to him in whose favor the order was made. But if by the terms of the mortgage the mortgagor has no remedy at law for the surplus proceeds the right thereto cannot be garnished as a debt due him (c): and it would seem also there is no remedy in equity, by garnishment at least (d).

Distress clause, As a security to the mortgagee for the payment of interest, he has sometimes granted to him the summary remedy of distress therefor; this is effected in two modes, either by

<sup>(</sup>a) Wright v. Rose, 2 Sim & Stu. 323; Bourne v. Bourne, 2 Hare, 35; Lewin on Trusts, 5 ed. 686; see also Fletcher v. Ashburner and Acknown v. Smithson, 1 White & Tud, Lg. Ca. equity, in notis.

<sup>(</sup>b) McKay v. Mitchell, 6 U. C. L. J. 61.

<sup>(</sup>c) Smith v. Trust and Loan Company 22 Q. B. U. C. 525.

<sup>(</sup>d) Horsley v. Cox, L. R. 4 Cha. App. 92. As to equitable execution, see ante p. 318, n. b; Gore v. Bowser, 24 L. J. Cha. 316, 440.

mple grant of right to enter and distrain for arrears of terest and expenses, and to dispose of the distress as landrds may do for rent in arrear; or, by the operation of an tornment clause, actually creating the relative positions of ndlord and tenant. If the remedy be given by the former ode, viz., by mere grant of right to distrain, then it will seen it is less efficacious than the latter, for it can does not conerate as nothing more than a mere personal license to fer a land-lord's remeke the goods of the mortgagor; it cannot operate so as to dies. ve the mortgagee the ordinary right of landlords to take e goods of third persons on the premises demised (a). either can it operate as a grant of a rent charge for want an estate in the mortgagor whereout to grant it (b), his tate having been conveyed by the mortgage. It is there- Tenantey or re more to the interest of the mortgagee to constitute the attornment ortgagor his tenant, either at will, or from year to year: e latter tenancy is to be preferred, as the former is feasable by the death (c), or alienation of either party with tice to the other (d), and consequently the rent is precarious. a tenancy from year to year be created, care must be sen to introduce a clause enabling the mortgagee at any ne after default to determine the tenancy, as otherwise, less intent to the contrary were apparent on the mortge, the ordinary right given to the mortgagee to enter ght be overridden, and the mortgagor might, notwithinding default by him, be entitled to the usual half-year's tice to quit, incident to a tenancy from year to year bee the tenancy could be determined (e). If an attorment use as above, creating a tenancy, be introduced, it will unnecessary, perhaps indeed improper, to insert the ual clause authorizing the mortgagor to retain possession l default.

a) Freeman v. Edwards, 2 Ex. 732; Royal Canadian Bank v. Kelly. C. P. U. C. 196, per Gwynne, J.

b) Per Patteson, J., Doe d. Garrod, v. Olley, 12 A. & E. 481; see per k, B., in Freeman v. Edwards, 2 Ex. supra.

c) Turner v. Barnes, 2 B. & S. 435. (d) Post p. 393, n. d.
e) Metropolitan Society v. Brown, 4 H. & N. 428. Doe d. Bastow v.
r, 11 Q. B. 122; see further the notes to Keech v. Hall, 1 Smith Lg. es, 523.

Attornment or tenancy clause.

The tenancy is created by a clause declaring that the mortgagor attorns and becomes tenant from year to year (or otherwise) to the mortgagee, his heirs and assigns of the premises conveyed, at the yearly rent of a sum named equivalent to the interest, payable in half-yearly or other payments, according to the days fixed for payment of interest, with a proviso that the mortgagee, his heirs or assigns may on certain events, as default in payment, or breach of covenant, enter and determine the tenancy with-This tenancy would not seem to be open to out notice. any objection on the ground of want of certainty in the term (a): a subject which is hereafter considered. In a recent case (b), a mortgagor in possession conveyed by way of mortgage to the defendants to secure advances, on trust that they might immediately, or at any time, sell the The conveyance recited the prior mortgage, and premises. contained an attorment clause, under which the mortgagor became tenant to the defendants for ten years at a yearly rent, provided the security should so long subsist, with power to the defendants at any time before or after sale, without any demand, to enter and determine the term. The defendants never executed the conveyance. It was held that it was apparent on the deed that the parties only intended to create a tenancy at will, consequently that the non-execution of the deed was immaterial; and that as the parties had by the deed agreed that the relation of landlord and tenant should be created between them, the mortgagor was estopped from setting up that the defendants had no legal reversion, notwithstanding that fact appeared on the mortgage; and a distress for the rent was held good. Lush, J., observed, "It is plain that there was no intention that the mortgagor should remain in possession any given length of time, but that he should remain on the premises at the will of the mortgagees, he binding himself to pay £800 for & term not exceeding ten years, if left in possession so long." As regarded the creation of a term for ten years, and non-

<sup>(</sup>a) Wilkinson v. Hall, 3 Bing. N. C. 533; Ford v. Jones, 12 C. P. U. C. 358. (b) Morton v. Woods, L. R. 3 Q. B. 658.

execution by the mortgagees, Blackburn, J., seemed to think it possible, if it were necessary to decide on the effect of non-execution, that the instrument might operate as a conveyance to the mortgagees to the use of the mortgagor for ten years: he agreed however, that the tenancy was at will.

A very recent case (a) bears as well on the creation of relationship of landlord and tenant between mortgagor and mortgagee, as on the effect of a license granted by the mortgagor to distrain for interest in arrear as for rent in The case is of importance from the frequency with which the facts are likely to occur, by reason of the very general adoption of the forms given by the act.

It was an action of replevin, and "the defendants avow- Relationship ed in substance that before the said time when, &c., one of landlord and tenant, Dewey mortgaged to defendant Kelly certain lands, the said and right of mortgage containing a proviso for making the same void on 27 & 28 Vic. payment of the amount secured by a day named, and cove- c. 31, clauses nant for payment, and also covenant for distress, on default 15 & 17. in payment, in accordance the terms of clause 15 of schedule 2. 27 & 28 Vic. ch. 31, with an averment that there were due \$1.412.50 for interest, and that default been made. and thereupon defendant Kelly distrained. The second avowry was in all respects similar to the first, with the exception of an averment that the covenant for listress was a license to take any goods found on the premises, and the plaintiffs claimed the goods under the alleged conveyance thereto from said Dewey subsequently so said mortgage and the accrual of the interest thereunder: and that plaintiff had at the time of said conveyance notice of said mortgage, its covenants, &c."

The avowries were demurred to, and were held bad as not shewing "that the mortgage contained a provision that the mortgagor should be permitted to continue in possession of the mortgaged premises, nor that he did occupy in pursuance of such permission at the time of distress, or at any

<sup>(</sup>a) Royal Canadian Bank v. Kelly 19 C. P. U. C. 196.

time," which it was considered were matters necessary to be averred.

Royal Canadian Bank v. Kelly.

By the judgment (p. 201) it would appear that in the covenant for payment no day was named for payment of interest except the one day named for payment of principal The distress was made after default in the covenant: and by the judgment the distress appears to have been made only for the interest which accrued due up to the day of payment of principal named in the mortgage. have been admitted on argument that the mortgage was in fact drawn under the act of 27 & 28 Vic., but there was nothing on the record to shew that: though it did so happen that the license to distrain was identical with the lengthy form set out in the second column of the act; and why the lengthy form was adopted, and yet the mortgage drawn with reference to the act. did not appear. As the mortgage was admitted to have been drawn under the act, and "to contain a clause providing for the mortgagor continuing in possession," it is to be assumed the language of that clause was the same as clause 17 of the forms given by the act.

The authorities on the so-called attornment, possessory, and distress clauses were reviewed at length, and the following is so much of the judgment as bears on the facts as above stated:—

"The language of the covenant is, as it appears to me, very different from that used in Chapman v. Beecham (a), Doe Wilkinson v. Goodier (b), and Pollitt v. Forrest (c). The covenant is not, that the mortgagee may 'distrain for the interest' in like manner as landlords are authorized to do in respect of distress for arrears of rent upon leases for years,' nor 'in like manner as for rent reserved by lease;' nor is the covenant in a negative form, imposing a penalty for which the mortgagee may distrain as for rent in arrear as in Pollitt v. Forrest; but it is, that if the mortgagor make default in payment of interest, it shall and may be lawful

<sup>(</sup>a) 3 Q. B. 723.

<sup>(</sup>c) 11 Q. B. 962.

<sup>(</sup>b) 10 Q. B. 957,

he said mortgagee, his heirs or assigns, to distrain for on the said lands, &c., or any part thereof, and by ess warrant to recover. 'bu way of rent.' (that is, as it ars to me, to recover the interest as rent in the characf rent) reserved, as in the case of a demise of the lands, &c.: that in fact, the interest shall be pavable it reserved by the mortgagee, as in the case of a demise ch this indenture is to be taken to be) of the said lands the mortgagee to the mortgagor.

is, it appears to me, is the natural construction to put the intention of the parties, as expressed in these 3. coupled with a clause that the mortgagor shall in in possession of the lands, and his occupation in nance of such agreement.

on the whole, I have come to the conclusion that a Relationship e in a mortgage, that the mortgagor shall continue in of landlord ssion coupled with his occupation in pursuance of such and right of e, and coupled also with a covenant for distress, in the distress under 27 and 28 Vic. s contained in this instrument, does create the re-c. 81, clauses of landlord and tenant at a fixed rent; that by the 15 & 17, coupled with iture of mortgage, in this case, the tenancy created was occupation.

the day of re-payment of the principal for a deterte term, and thereafter a tenancy at will at an annual incident to which tenancy was the right of dising upon the goods of third persons upon the premises. however, of opinion, that the demurrers to these ries must prevail; for in neither of these avowries is eged that the mortgage contained a provision that the ragor should be permitted to continue in possession of portgaged premises, nor that he did occupy in pursuance ch permission at the time of the distress, or at any time, h are matters, as it appears to me, necessary to be aver-

The distress appears to have been made only for the est which accrued due up to the day of payment of ipal named in the mortgage, and, treating the tenancy at day to be for a determinate period, and not at will, mportant to enquire whether the will was determined in way on that day or at any time prior to the distress;

Royal Canadian Bank v. Kelly. for if the distress was made after the will had been determined, and the mortgagor continued in possession as a trespasser, then the distress can only be sustained as a distress, after the determination of a term, under 8 Anne, ch. 14, in which case it would seem to be necessary to aver that it was made within six months after such determination, and during the possession of the same person, who had been a tenant; and it is for the avowant to shew clearly his right to distrain: Haacke v. Marr (8 C. P. 41)."

The learned Judge who gave judgment placed some stress on occupation before, as well as after, the determination of the term, from which it would seem that he did not regard the case as one simply in all respects as of demise to a tenant for a term certain at a fixed rent, in which case the entry or occupation would be immaterial (a).

Mortgagor continuing in possession after expiry of redemise. It was further considered that after the payment of the principal, and the determination of the term on that day, (the mortgagor continuing in possession), there was created "a tenancy at will at an annual rent, incident to which tenancy was the right of distraining on the goods of third persons on the premises," notwithstanding the covenant as to interest, and so consequently the distress clause as to rent, did not extend to payment of interest after the principal fell due and the then determination of the term, and absence of evidence of assent to a tenancy at will at a rent on the holding over after expiry of the term (b).

<sup>(</sup>a) 1 Wms. Saund. 202, a. n. 1.

<sup>(</sup>b) As to possession under an executory demise, or agreement for a lease at a fixed rent, and liability for the rent, and moneys made payable qua rent, Anderson v. Midland Railway Company, 3 E. & E. 614: Marquis Camden v. Batterbury, 5 C. B. N. S. 808. As to a mortgagor in possession, Hitchman v. Walton, 4 M. & W. 413. per Abinger, C. B.; Turner v. Doe d. Bennett, 9 M. & W. 643: Partridge v. Bere, 5 B. & Ald. 604, Watkins Conv. 9th ed. p. 13, note: Doe Roby v. Maisey, 8 B. & C., 767; Wilkinson v. Hall, 3 Bing. N. C. 533; 1 Smith, Lg. Ca., 6th ed. 528, 536; Post p. 388; As to implied tenancy at will in case of mortgagor in possession, see post, p. 388, note d. As to liability of a lessee who holds over after expiry of his term for rent alleged to fall due afterwards and during possession; Jenner v. Clegg, 1 Moo. & R. 213; Alford v. Vickery, 1 Car. & M. 280; Williams v. Stiven, 9 Q. B. 14.

The operation of the proviso for quiet enjoyment by the Proviso for ortgagor is hereafter alluded to (a): it will there be quiet enjoyen that it is frequently invalid for the purpose intended: fault. estions on this proviso frequently arise in actions of ectment, and on its effect depends also the period from hich the Statute of Limitations will begin to run against e mortgagee.

Unless there be some absolute necessity for the mortgagee Inadvisable enter into possession, such a course is usually avoided, gages should r it involves an account between him and the mortgagor. take possesmortgagee in possession is liable to account for what he as received, or for what without wilful default, he might thereon to We received (b). He is chargeable with an occupation rent account. respect of property held by himself, and is liable for voltary waste. (as in pulling down houses or opening mines). 3 a mortgagee in possession is regarded in some measure the light of a trustee, he will, if he assign the mortgage ed possession to another without the assent of the mort-Leor. continue to be accountable and chargeable for rents ed profits after assignment (c); a matter of some impornce where they should be large, and the assignee should ceive, or but for his wilful default might have received, ore than sufficient to pay the mortgage debt.

For many improvements he might make he will not be What charges owed, as otherwise by large expenditure he might pre-against mortde the mortgagor from redeeming (d). This would be gagor. at has been termed "improving the mortgagor out of his :ate" (e).

In the absence of any contract by the mortgagor to insure. that he, the mortgagee, may, he cannot add any premiums may pay for insurance to the mortgage debt as a charge

a) Post, p. 388.

b) As to the nature and extent of liability, see Coldwell v. Hall, 9 ant, 110; Paul v. Johnson, 12 Grant, 474; see also generally as to liaty of mortgagee, Taylor Cha. Orders, 3 ed. p. 232.

<sup>(</sup>d) Kerby v. Kerby, 5 Grant, 587. c) 1 Eq. Ca. Abg. 328, pl. 2.

e) Sandon v. Hooper, 6 Bes. 246.

on the property (a). He may charge his actual expenses, but cannot stipulate for an allowance or commission to himself for the trouble of collecting the rents: nor charge for his trouble in collecting the rents. He may however. when the collection of the rents would involve time and trouble, appoint a receiver, and allow and charge a reasonable remuneration for the services of such receiver. He will be also allowed for repairs, and expenses incurred in upholding the mortgagor's title against adverse claimants

Con. St. c. 88. s. 19. Interest 6 ceases to charge the land.

By Con. Stat. ch. 88, sec. 19, "No arrears of rent or of interest, in respect of any sum of money charged upon or payable out years over due of any land, or rent or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent." 4 W 4, c. 1, s. 45.

but as against gagor all arable on the covenant algor is seeking

As the mortgagee can reach assets descended to the heirs heirs of mort- of a mortgagor by suit against them on the covenant of rears recover- their ancestor, and also by suit against the personal representatives, and in such suit the equity of redemption would lowed; as also be saleable, the mortgagee to avoid circuity of action is alwhere mortga- lowed, as against the heirs, to tack to his mortgage debt the to redeem, or whole arrears of interest, though exceeding six years, remortgagee has coverable on the covenant (b). And it would seem that power of sale. where the mortgagor is seeking to redeem, or the mortgagee has sold under his power of sale, and has surplus proceeds on hand, he is entitled to all arrears of interest that Con. St. c. 78, are recoverable on the covenant (c), which by Con. Stat. ch. 78, sec. 7, are only barred after twenty years, notwith-

Interest how calculated.

As regards calculation of interest when partial payments have been made, these are to be applied when the principal

standing ch. 88. sec. 19.

<sup>(</sup>a) Dobson v. Land, 8 Hare, 216; Brooke v. Stone, 34 L. J. Ch. 251; but see Scholefield v. Lockwood, 9 Jur. N. S. 738.

(b) Carroll v. Robertson, 15 Grant, 173; Fisher, Mortgages, 2 d.

<sup>925, 926.</sup> 

<sup>(</sup>c) Edmunds v. Waugh, L. R. 1 Eq. 418., questioning Mason v. Broad, bent, 33 Bea. 296; see further Ford v. Allen, now pending in Chancer.

is not overdue in reduction of interest. When the principal is overdue, it is much to the mortgagee's interest to apply the payments on the interest, and he is entitled so to apply them, in the absence at least, of any appropriation of such payments by the debtor. The method usually adopted in making out an account, viz., that of charging first the interest on the whole debt for the whole period, as if no payment had been made, then allowing interest on each payment from the time it was made, and then deducting all the payments and interest on them from the whole debt and interest on it, is not the correct way of arriving at a balance: it is so much in favor of the debtor, that where there has been a long arrear of interest, and payments made on account by the debtor not covering the interest alone, the debtor in the course of time, without adding any payment in the meantime will make his creditor his debtor (a).

There is sometimes a provision that if interest be not Provision as punctually paid, the rate shall be increased; in such case interest. the increased rate will be viewed merely as a penalty against which a court of equity will relieve. On the other hand if the higher rate be named as that at which interest shall be paid with a provision for its reduction on punctual payment, here on default the higher rate can be enforced and no relief had (b). And so also a stipulation that if the principal be not paid on the day named, the rate shall be increased is enforcible in equity as well as at law (c).

There has now to be considered the respective positions Right of posof the mortgagee, mortgagor, and tenants of the mortgagor. session. both on demise before and after the mortgage.

As between mortgagee and mortgagor merely, at first Definition of sight it would appear as though there could be no great position of mortgagor difficulty in determining their respective rights to posses- in possession. sion, or in defining the position of a mortgagor: it will be seen, however that it is a matter of some difficulty.

<sup>(</sup>a) Sir James McGregor v. Gaulin, 4, Q. B. U. C. 378. s the mode usually adopted by merchants, and there is no doubt that where their transactions are large, they must lose greatly by it.

<sup>(</sup>b) Davidson Conveyancing, 2nd ed. vol 2, 535.

<sup>(</sup>c) Waddell v. McColl, 14 Grant, 211.

Definition of position of mortgagor in possession.

Lord Wensleydale has said (a) "a mortgagor is not in all respects a mere bailiff, he is much like a bailiff; he is not a mere tenant at will: in fact he can be described merely by saving he is a mortgagor." Lord Denman has said it is a very dangerous thing to attempt to define the position of a mortgagor. Under the selfsame circumstances a mortgagor in possession has sometimes been termed tenant at sufferance, sometimes tenant at will, sometimes tenant at will auodammodo (b). It is therefore dangerous to infer that under certain circumstances a mortgagor in possession has all the rights or liabilities of an ordinary tenant at will or at sufferance, merely because in such circumstances in one or more cases he is designated as a tenant of either character.

Right of possession between mortgagee and mortgagor.

The right to possession as between mortgagee and mortgagor may be considered under the following heads:-

When mortgage silent as to possession.

1. When nothing is said as to possession in the mortgage, or at or after its execution, and no tenancy is created by any implied or express agreement; here the mortgagee's right of possession exists from the time of execution of the mortgage (c); and the mortgagor continuing in possession is in the position of a tenant at sufferance.

When mortgage silent as to possession, consents to mortgagor's possession.

2. If the mortgage is silent as to possession, and the mortgagee either expressly consent to the mortgagor remainand mortgagee ing in possession, or the facts are such that such consent can be implied (d), then the mortgagor cannot be treated as a trespasser, or tenant at sufference, and so ejected without demand of possession. The position of a mortgagor under these circumstances is that of a tenant at will both as regards right to possession and the application of the Statute of Limitations.

<sup>(</sup>a) Eitchfield v. Ready, 20 L. J. Ex. 52; and see 11 A. & E. 314.

<sup>(</sup>b) See notes to Keech v. Hall, 1 Smith, Lg. Ca. 2 ed. 537.

<sup>(</sup>c) Doe, d. Mowat v. Smith, S Q. B. U. C. 139.

<sup>(</sup>d) Can such consent be implied so as to create a tenancy at will free the mere fact of silence by the mortgagee and his knowledge that the mortgagor remains in possession? See notes to Keech v. Hall, supra; and Evans v. Elliot. 9 A. & E. 342; Royal Canadian Bank v. Kelly, 19 C. P. U. C. 196, per Gwynne, J.

- 3. If nothing appear as to a tenancy or right to pos-Merecovenant session, beyond a covenant by the mortgagor that after by mortgagor that mortgadefault the mortgagee may enter, hold, possess and enjoy, gee after dethis will not by implication override the effect of the con-fault may vevance which gives an immediate right of entry to the mortgagee: such a covenant may be regarded only as an ordinary covenant for quiet enjoyment, to take effect after default (a).
- 4. If the mortgage contain a positive agreement or Positive proviso that till default in payment on certain named agreement that mortdays, the mortgagor may remain in possession, this gagor may reoperates as a re-demise to the mortgagor "for as long main in posas he had time given him to redeem by payment of default. the mortgage money, unless he make default in any intermediate payment," as being an affirmative agreement by the mortgagee for a definite named time, and the mortgagee's right of entry will accrue only on default (b).
- 5. On default in the last instance the mortgagor becomes On default. tenant at sufferance.
- 6. If the duration of the intended demise be un-Possessory certain, or couched in the shape only of a negative right on uncertainty of covenant by the mortgagee, it has been said this will not the term, or operate as a valid demise (c): thus a mere covenant by the mere negative covenant by mortgagee that in case of non-payment on the day named the mortgagee he would not enter till after a month's notice in writing. has been said to be invalid as a demise, on the double objection of want of certainty, and of affirmative language; and the following passage in Sheppard's Touchstone (8 ed. 272) has been referred to: "If A do but grant and covenant with B, that B shall enjoy such a piece of land for twenty

<sup>(</sup>a) Doe d. Roylance v. Lightfoot, 8 M. & W. 553.

<sup>(</sup>b) Wilkinson v. Hall, 3 Bing. N. C. 533; Ford v. Jones, 12 C. P. U.

<sup>(</sup>c) See the notes to Keech v. Hall, 1 Smith Lg. Ca. 6 ed. p. 523; see also on the question as to certainty, Ashford v. McNaughten, 11 Q. B. U. C. 171; McMahon v. McFaul, 14 C. P. U. C. 433; Konkle v. Maybee. 23 Q. B. U. C. 274; Sidey v. Hardcastle, 11 Q. B. U. C. 162; Copp v. Holmes, 6 C. P. U. C. 373; Richardson v. Langridge, Tudor's Lg. Ca. 2 ed. p. 14, and cases there referred to; see also a review of the cases in Royal Canadian Bank v. Kelly, 19 C. P. U. C. 196.

years, this is a good lease for twenty years: so if A promise to B to suffer him to enjoy such a piece of land for twenty years, this is a good lease for twenty years. So if A license B to enjoy such a piece of land for twenty vears, this is a good lease for twenty years. And therefore it is the common course if a man make a feoffment in fee, or other estate, upon condition that if such a thing be or be not done at such a time, that the feoffer. &c., shall re-enter, to the end that in this case the feoffor, &c.. may have the land, and continue in possession until that time, to make a covenant that he shall hold and take the profits of the land until that time; and this covenant in this case will make a good lease for that term: if the uncertainty of the time, whereunto care must be had do not make it void;" (Mr. Preston adds: The limitation of a certain term, with a collateral determination on the event. would meet the difficulties of the case) "and therefore if A bargain and sell his land to B on condition to re-enter if he pay him £100; and B doth covenant with A that he will not take the profits until default of payment; in this case, howbeit this may be a good covenant, yet it is no good lease (for want, says Mr. Preston, of a more formal contract, and also for want of certainty of time). And if the mortgagee covenant with the mortgagor that he will not take the profits of the land until the day of payment of the money, in this case, albeit the time be certain, yet this is no good lease but a covenant only," (since, says Mr. Preston, "the words are negative only and not affirmative).

The above passage from the Touchstone was referred to in a modern case (a), in which the mortgage named a day for payment, and provided that in case of non-payment, after a month's notice according to the covenant, it was to be lawful for the mortgagee to enter into possession and lease and sell; and there was a negative covenant by the mortgagee that no sale or lease should be had till after one month's notice, demanding payment of that which at the

<sup>(</sup>a) Doe d. Parsley v. Day, 2 Q. B. 147.

end of that time should be due, and default made at that time: ejectment was brought after the day named, by the mortgagee, no notice or demand of any kind appeared to have been given, and objection was taken on that ground. The court, after quoting at length from the Touchstone, and stating that "after the day of payment, the time, if any, during which the mortgagor was to hold, was not determinate, but altogether uncertain; neither was there any affirmative covenant whatsoever that he should hold at all:" considered further, that "the covenant therefore that the mortgagee shall not sell or lease, even if it be construed should not enter, until a month's notice, was a covenant only and no lease:" and consequently "that there was no re-demise so as to entitle the mortgagor to notice or demand of possession, but he was in the same position that mortgagors usually are viz: liable to be treated as trespassers at the option of the mortgagee." The court in the above case distinguished as to others (a), and remarked also as to another case (b), that "it may be questionable whether sufficient attention was paid to the point as to the certainty of the time; at all events it was not decided on any ground that such certainty was immaterial."

7. If by the operation of an attornment clause, as before Possessory explained, the mortgagor should expressly become tenant right on attornment. to the mortgagee, either at will or from year to year, at a rent, then he will have the ordinary right to possession of any such tenant, except in so far as such right may be qualified by the mortgage itself in giving right to entry without notice on default in payment, or non-observance of covenants.

8. Those cases where, as in the fourth and seventh On non-exeinstances above, the proviso for possession is valid as a cution by mortgagee of re-demise by the mortgage if the mortgage were executed the mortgage by him, but if not so executed, might fail to create the term intended, as not being in compliance with the Statute of Frauds, or Con. Stat., ch. 90.

<sup>(</sup>a) Wheeler v. Montefiore, 2 Q. B. 133.

<sup>(</sup>b) 2 Doe d. Lyster v. Goldwin, 2 Q. B. 143.

Non-execution of mortgage by mort-

gagor.

It would seem that where the proviso for possession would give a right to possession exceeding three years. though subject to earlier determination on default by the mortgagor, that non-execution by the mortgagee will cause the proviso to be invalid to create the term or right to possession intended (a): unless indeed the mort-The term may gage can operate to execute the term by way of use be executed by way of use in Thus it may well be contended that on a mortgage in fee favor of mort- by way of release or statutory grant, wherein the day for payment should be more than three years from execution of the mortgage, with a proviso for possession by the mortgagor till default, that it might operate to create a use for the term in the mortgagee for the mortgagor, which the statute would execute (b), and as to which the execution by the mortgagee would be immaterial. If however, the conveyance should be as is usual, unto and to the use of the mortgagee, or otherwise there should be a use on a use, then of course no legal estate in the term would be executed (c).

Where the term intended to be created cannot be executed in the mortgagor under the Statute of Uses, and assuming, as would seem to be the case (d), that where it would exceed three years, the non-execution by the mortgagee would prevent its taking effect;

<sup>(</sup>a) Swatman v. Ambler, 8 Ex. 72; Pitman v. Woodbury 3 Ex. 4; Doe v. Lightfoot, 8 M. & W. 553; Wilkinson v. Hall, 3 Bing. N. C. 533; Ford v. Jones, 12 C. P. U. C. 358.

<sup>(</sup>b) Morton v. Woods, L. R. 3, Q. B. 658, per Blackburn, J.; in argument and judgment, see this case ante p. 380; see Simpson v. Hartman, 27 Q. B. U. C. 460, where a mother seised in fee in consideration of five shillings and natural love, granted, bargained, and sold to her daughter and her heirs, to their own use, for ever, "reserving, nevertheless, to my the grantor's) own use, benefit and behoof, the occupation, rents, issues, and profits of the above granted premises during my natural life. court considered that the fee passed to the grantee. The operation of the Statute of Uses was not alluded to; and if it had been, it would seem that taking the conveyance to operate by way of grant, (whatever might have been the case if it were to operate as a covenant to stand seized, or by way of bargain and sale), the use in favor of the granter would still have been a use upon a use, and so unexecuted by the statute, and a mere trust. This case therefore, does not conflict with what is stated in the text.

<sup>(</sup>c) See Simpson v. Hartman, supra.

<sup>(</sup>d) Ante note a.

clause as to possession would still be evidence of a ncv at will: and if there be an attornment clause e mortgage under which the tenant is to pay interis rent, and occupation subsequently by the mortr. the position of landlord and tenant will be created. the mortgagee can distrain (a): nor would it seem to ecessary for such purpose that rent should theretofore : been paid aua rent (b): probably also, if rent were qua rent, with reference to a year or aliquot part of ar, and there were nothing in the mortgage shewing a tenancy at will only were intended, a tenancy vear to vear would be created (c).

the mortgage be to a married woman (as is now not Possessory mmon since Con. Stat. ch. 73), then it would seem right of mortthere should be a certificate of her examination, and mortgage to her husband should be a party, as required by Con. married woman who is ch. 85, in order that the clause giving to the mort-not examined r right to possession till default, should operate to cap. 85. e a term in his favor, unless as above suggested, the can be executed by way of use.

the mortgagor be tenant at will to the mortgagee an Sub-lease by a mment or sub-lease by the mortgagor does not per se mortgagor tenant at will. out notice to the mortgagee determine the tenancy (d). position of a tenant of a mortgagor, himself tenant at to the mortgagee, seems to be involved in some obscuas a general rule the lessor being reversioner can treat enant of a tenant at will as a trespasser; but there is e (e) "which goes so far as to shew that a mortgagor ossession, who is not treated by the mortgagee as a asser may confer on his lessee the legal possession, sugh the mortgage was in fee "(f).

West v. Fritche, 3 Ex. 216; Morton v. Woods, L. R. 3 Q. B. Royal Canadian Bank v. Kelly, 19 C. P. U. C. 196, ante p. 381. Per Blackburn, J., in Morton v. Woods, supra. Richardson v. Langridge, 1 Tudor Lg. Ca. 2 ed. p. 20, in notis;

Pinhorn v. Souster, 8 Ex. 763. Melling v. Leak, 16 C. B. 652, Richardson v. Langridge 1 Tud. Lg. Cases 2 ed. 18

Doe d. Higginbotham v. Barton, 11 A. & E. 307.

James v. McGibney, 24 Q. B. U. C. 158 per Draper, C. J. See vans v. Elliott, 9 A. & E. 342, per Ld. Denman, C. J.

The mortgagee may however, by recognizing the pos-

Mortgagee and tenants of the mortgagor, after the mortgage,

mortgage,

no privity between them.

session of the tenant of the mortgagor preclude himself from being able to treat him as a trespasser; and it is said he becomes tenant to the mortgagee on payment to him of the rent reserved by the mortgagor (a). But it would seem that the mere receipt of interest by the mortgagee from the mortgagor will not amount to such recognition (b). The mortgagee cannot without some assent of such tenant. express or implied, constitute him his tenant, and cause him to hold of him the mortgagee; and without such assent evidencing a new tenancy between the mortgagee and the tenant, no privity of estate exists between them, and the mortgagee would not, as in the case of a tenant before mortgage, have the rights and remedies of the mortgager to the rent (c). It is said "that in order to create a tenancy between the mortgagee and the tenant let into possession by the mortgagor, there must be some evidence whence it may be inferred that such relation has been raised by mutual agreement, and that in such case the terms of the tenancy are to be ascertained (as in an ordinary case) from the same evidence which proves its existence: and where the tenant does consent to hold under the mortgagee, a new tenancy is created, not a continuation of the old one between him and the mortgagor" (d). It would seem however, that the consent must be of a particular

<sup>(</sup>a) Keech v. Hall, 1 Smith, Lg. Ca. 6 ed. pp. 526; Moss v. Gallimore, Ib. 568; Doe d. Whitaker v. Hales 7 Bing. 322.

<sup>(</sup>b) Doe d. Rogers v. Cadwallader. 2. B. & Ad. 473; see however. Evans v. Elliott, 9 A. & E. 342, per Denman, C. J.

<sup>(</sup>c) Evans v. Elliott, 9 A. & E. 342; Partington v. Woodcock 6 A. & E. 690, per Patteson, J.

<sup>(</sup>d) Moss v. Gallimore, 1 Smith Lg. Ca., in notis 6 cd. p. 570. Of what nature would be the new tenancy between the mortgagee and tenant? For instance, if the demise from the mortgagor were by deed having more than three years to run with covenants to repair, or cultivate in a particular mode, and all that passed between the mortgagee and the tenant was a verbal consent under threat of eviction to hold of the mortgagee, on payment of the rent reserved by the old lease, it would seem that at most this could not create a greater interest than from year to year; per Coefburn C. J., Carpenter v. Parker, 3, C. B. N. S. 235. If so, would the terms of the old lease as to repairs and cultivation govern and be incorporated into the new tenancy? See ante p. 60, n. a.

nature to create such new tenancy, at least to have the How by act of effect of absolving the tenant from liability to pay the rent morigages the tenant may be reserved on the lease to him from the mortgagor, when the absolved from same has not been actually paid under some constraint to mortgagor, the mortgagee, and that mere consent alone to hold of the mortgagee will not have this effect. Thus mere notice by the mortgages to the tenant will be no defence to an action by the mortgagor either for rent due before or after the notice.

The ordinary principle as regards a tenant is that he nust pay rent, or for use and occupation, to the person from whom he took, and cannot deny his landlord's right short of eviction, or what is tantamount to eviction, by title paramount to the landlord; or payment under constraint of paramount charges as rent charges, or other claims issuing out of the land (a). Applying these principles to the case of the mortgagor's tenant on demise after mortgage, then it is clear if the tenant be rightfully evicted by the mortgagee and let into possession again on a new agreement between him and the mortgagee, that the old lease ceases: so also it would seem to be, (though it is by no means clear), if there be only a constructive eviction, as for instance a threat to evict, coupled with an attornment to the mortgagee as his tenant (b). And though there have been no eviction, either actual or constructive, and no attornment or new tenancy created between the mortgagee and the tenant, still payment to the former under constraint in discharge of his claims, will be a good defence by the tenant in an action for the rent by the mortgagor (c). But as before mentioned, mere notice by the mortgagee to the tenant will not absolve the tenant from liability to his lessor for past or future rent; and there has been some question as to whether notice from the mortgagee, though coupled

<sup>(</sup>a) Notes to Lampleigh v. Braithwait; 1 Smith Ly. Ca., 6th ed. p. 156.

<sup>(</sup>b) Doe d. Higginbotham v. Barton, 11 A. & E. 315. Mayor of Poole v. Whitt, 15 M. & W. 571; but see the judgments in Delaney v. Fox, 2.
C. B. N. S. 768; Carpenter v. Parker, 3 C. B. N. S. 237.

<sup>(</sup>c) Johnson v. Jones, 9 A. & E. 809. See also Murdiff v. Ware, 21, Q. B. U. C. 68.

with payment of the rent, is any defence to an action by the mortgagor if the rent were overdue before notice given (a).

Position of mortgagee and tenant of demise before mortgage.

So far as regards tenants on a demise from the mortgagor prior to the mortgage, the mortgagee, subject to the mortgagor on effect of the usual proviso that till default the mortgagor may remain in possession, or receive the rents and profits, occupies the ordinary position of assignee of the reversion on a lease, and has the same, rights, remedies and liabilities as regards the lessee. Attornment by the tenant to the mortgagee is not requisite, and until the mortgagee interferes with the tenancy the tenant is safe in paying the rent to the mortgagor (b).

Right of mortgagor to the rents.

It not unfrequently happens that the mortgagee permits the mortgagor to receive the rents, and does not in any way interfere with the tenancy, and that the tenant omits to pay rent to either, the question then arises, how the mortgagor can enforce payment. It is clear that where there is no subsisting re-demise to the mortgagor, and the mortgagee is the reversioner, that the mortgagor is not entitled to sue or distrain in his own name, and so no proceedings can be had unless in the name of the mortgagee: recent cases go to shew that under such circumstances as above the mortgagor is "presumptione juris authorized," "if it should become necessary, to realize the rent by distress, and to distrain for it in the mortgagee's name, and as his bailiff" (c). It is to be observed that those cases however, were cases in which there was no re-demise in the mortgage to the mortgagor, and from all that appears in them, there was no right to possession in the mortgagor. In any case in which there should be a lease at a rent, and then the lessor should mortgage his reversion with a re-demise to himself, then it

<sup>(</sup>a) Wilton v. Dunn, 17, Q. B. 295: see also per Hagarty, J., is Fairbairn v. Hilliard, 27 Q. B. U. C. 111, and Waddilove. v. Barnett, 2 Bing. N. C. 538.

<sup>(</sup>b) 4 Anne, c. 16, s. 10; Trent v. Hunt, 9 Ex. 23., per Alderson, B. (c) Trent v. Hunt, 9 Ex. 24, per Alderson B.; Snell v. Finch, 13 C. B. N. S. 651; see also the Dean of Christchurch v. Duke of Buckingham, 17 C. B. N. S. 391, per Willes, J.

vould seem that during the subsistence of such re-demise. and the consequent right of the mortgagor to the pernancy of the profits, any distress for rent due from the tenant luring such subsistence, should be by the mortgagor and n his name only. He would appear then to be the reverioner, not indeed of the whole reversion, but of part, and o entitled to the rent and to distrain. If A seized in fee emise for a thousand years at a rent, and pending the ease, demise to B for five years, B becomes reversioner and ntitled to the rent as to the first lease during the term ranted to him, and instead of enjoying the possession of he land, he takes the rent (a). The position of B the econd lessee, and of the mortgagor, in the case above put. ppear in principle identical.

To every assignment of a mortgage, the mortgagor, if Assignment of ossible, should be a party; if not a party, he should at mortgager, not a party, he should at mortgager ast recognize the existence of the mortgage debt, and if should join in, he mortgagee be in possession, assent to the transfer (b). he object of the mortgagor being made to recognize the portgage debt as subsisting, arises from the fact that the ssignee takes subject to all the equities and settlement of assignee takes counts between the mortgagor and mortgagee. Thus, subject to f nothing were ever due on the mortgage, or it were ob- tween mortained by fraud and without consideration, an assignee, mortgagor. hough for value and without notice, would stand in no petter position than the mortgagee (c). But where an nsolvent person gave a mortgage to his son for a thousand lollars, which sum was composed in part of six hundred dollars not due from the mortgagor, but fraudulently inerted as due, though the mortgage was held fraudulent and void in toto against creditors, yet it was considered that an assignee might claim the benefit of a purchase for value without notice (d). Whatever also the mortgagor could claim as a deduction from the mortgage debt, by

<sup>(</sup>a) Preston on Conv., vol. 2, 145; Co. Litt. 215 a.; Harmer v. Bean, 3 Car. & Kir. 307. (b) See post, p. 398, n. c.

<sup>(</sup>c) McPherson v. Dougan, 9 Grant, 258.

<sup>(</sup>d) Totten v. Douglas, 15 Grant, 126.

Assignee takes subject to equities up to time of notice of assignment

reason of payment or set off, will be allowed as against assignee, who can stand in no better position than +.h. mortgagor. This rule will continue to apply even after transfer until the mortgagor have notice of the assign. ment: and any payments made to the mortgages (a) or it would seem, even set-off accrued against him. (b), though after transfer, without notice thereof, and under the imppression that he still held the mortgage, would be allowed against the assignee. Nor would it make any difference that payments were made, and were unindersed as such on the mortgage, and that the mortgage moneys were ment Hence the necessity of inquiry at least, then navable. prior to assignment, and of notice to the mortgagor any transfer, in case he does not become a party to the assignment. It would seem that under sec. 66 of the Reg istry Act registry of the assignment would not be notice the mortgagor, as that section only constitutes registry instruments notice to those claiming an interest subsequent to such registry.

Notice by registry.

The assent to the transfer where the mortgagee in possession may be of importance in some cases; for, as to assignment. before explained, a mortgagee in possession is liable to account for rents and profits, and chargeable also for loss to the mortgagor's estate through his wilful default, and as he occupies somewhat the position of a trustee for the mortgagor, if he assign, without assent of the latter, and deliver possession, he will continue responsible on default

Importance of assent by mortgagor

Covenant for title on assigment.

by the assignee (c).

On an assignment of a mortgage, or on sale under a power of sale, the only covenant for title to the land that the mortgagee can be required to give is that against his incumbrances.

Mortgages of leaseholds. when they should be by under lease.

The character of a mortgage of leasehold property must depend much on the nature of the lease; if the rent be of assignment or less amount than the annual value of the property, and the

<sup>(</sup>a) McDonough v. Dougherty, 10 Grant, 42; Engerson v. Smith, (b) Galbraith v. Morrison, 8 Grant, 289. 9 Grant, 16.

<sup>(</sup>c) Ante p. 485, n. c.; 1 Eq. Ca. Ab. 328, pl. 2.

covenants binding on the assignees (a) be not too onerous. then it is better to have the mortgage by way of assignment than underlease. This is advisable because if the mortgage be by way of underlease, which leaves a reversion in the mortgagor, he may perhaps by non-observance of some covenant in the original lease giving right of reentry to the lessor, forfeit the lease; whereas if the mortgage be by way of assignment of the whole estate of the lessee, no such danger is incurred. It is manifest also that this danger considerably depreciates the value of the secuity to the mortgagee, as being among other things likely affect the price on any sale under the power of sale in he mortgage. If however the rent be large and the covenants binding on the assignees of a burdensome nature. or such as the mortgagee might not wish to assume, as for nstance a covenant to repair from which destruction by are is not excepted, then he may have to rest satisfied with an underlease: for if he take an assignment he would during the continuance of his estate, be liable for the rent and the performance of such covenants; and that even though he should never enter (b): and it would seem even though he should not be entitled to enter; as where the mortgage should give right to the mortgagor to remain in possession till default in payment of interest or principal. and the interest should be punctually paid. Of course the head landlord could distrain on goods on the premises on non-payment of his rent; but he might lie by allowing arrears to accumulate, and ultimately sue the assignee for all arrears due during the time he was assignee (c): hence the necessity, if the mortgagor is to remain in possession, of providing in the mortgage that he pay the rent to the head landlord, and of ascertaining that it be paid.

A mortgage by way of sub-lease is usually for the whole Mortgage by term less a day; this prevents any privity of estate be-sub-lease.

<sup>(</sup>a) As to what covenants are binding on assignees. Spencer's case, 1 Smth Lg. Ca. 6 ed. 45; Western v. Macdermot, L. R. 1 Eq. 499; Wilson v. Hart, L. R. 1 Cha. App. 463. Ante p. 5.

<sup>(</sup>b) Jones v. Todd, 22 Q. B. U. C. 37; Cameron v. Todd, ib. 390; 2 Err. & App. Rep. 434. (c) See a case of this nature, note b. supra.

Mortgage by sublease.



tween the mortgagee and the original lessor, so that the former is not liable for rent or on covenants in the original The reversion though only of one day left in the mortgagor exposes the mortgagee to the danger of forfeiture and decreases the value of the security as above explained: but the decrease in value may be partially obviated, as it always should be, by a declaration in the mortgage that the mortgagor his executors, administrators and assigns will on any sale by the mortgagee, &c., under the power of sale stand possessed of and interested in the reversion in trust for the purchaser and to assign and dispose of the same as he shall direct. After a sale and conveyance of the term to a purchaser, he need not under such a declaration obtain an assignment to himself, because in that case as the term and the reversion immediately expectant thereon would meet in the same person, the term though for a longer period than the reversion would still be merged in it as being a higher estate, and thus the purchaser then stands in the position of assignee of the original lessee, and so liable on covenants running with the land which it was originally intended to avoid by the mortgage being by way of sublease. If therefore the purchaser is unwilling to assume the responsibility of the covenants, and at the same time wishes to avoid any danger of the mortgagor committing some act which would forfeit the lease, he might obtain an assignment to a trustee for him of the mortgagor's reversion (a).

<sup>(</sup>a) The forms are that the mortgagor shall convey his reversion as the purchaser shall direct, the object being that as mentioned in the text the purchaser may either take an assignment to himself, or avoid liability on the covenants by procuring an assignment to a trustee. It may be said however, the purchaser does not thereby escape liability, as he would be bound to indemnify his trustee against loss. Still the pecuniary position of the person selected as trustee might not be such as that he could suffer loss, and if he suffered no actual loss, he might be satisfied not to call on his cestui qui trust to relieve him. The propriety of such a course it for the parties adopting it to consider. That such an assignment is not to be deemed fraudulent, so as to be vacated by the lessor, see Woodfall L& Tenant, 9 ed. 241, 8 ed. 229; Rowley v. Adams, 4 My & Cr. 534; The mortgagor might also, if he were the original lessee and so always liable after assignment on his covenants, reasonably object to assign person who could not indemnify him against non performance of he covenants; but if he were an assignee, such objection would not hold, after assignment his liability ceases.

The law on the subject of equitable mortgages by deposit Equitable of title deeds depends much on the Registry Acts, and mortgages how affected under these the law varies. by registry

The act of 29 Vic. ch. 24, had provisions similar to sections 67 & 68 of 31 Vic. ch. 20, which repealed the former act, as, 65, 66. the language of which sections is as follows:-

Section 67. Priority of registration shall in all cases prevail 31 Via. c. 20. unless before such prior registration there shall have been actual ss. 67, 68, notice of the prior instrument by the party claiming under the and registry. prior registration.

Section 68. No equitable lien, charge or interest affecting Equitable and shall be deemed valid in any Court in this Province after this lions, &c. act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns, and tacking shall Tacking. not be allowed in any case to prevail against the provisions of this act.

As sec. 68 has been held not to be retrospective or apply 8, 68 not to equities subsisting before its enactment (a), it will be retrospective. requisite to consider the old law in reference to equitable mortgages by deposit of title deeds.

Under the law as it existed prior to the act of 29 Vic., The old lawan equitable right or interest incapable of registry was not registry act liable to be defeated by mere force of the registry act; in as against fact the case was not within the act (b): therefore a mort-equities incapable of gage created by mere deposit of title deeds, could not be registry. postponed by mere registry of another instrument. There is however sometimes difficulty in determining how far the equitable mortgage may be incapable of registry so as to be Case of writwithin the protection of this rule, in those cases where a ten memoranwritten memorandum accompanies the deposit. A distinc- paning equition has been made between those cases wherein the memorandum was a wholly executed agreement, and those wherein posit of title it was executory containing an agreement by the mortgagor to do something further towards perfecting the security.

<sup>(</sup>a) McDonald v. McDonald, 14 Grant, 133.

<sup>(</sup>b) Moore v. Bank, B. N. A., 15 Grant, 308, and cases there referred to; see this case in Appendix.

The former might perhaps require to be registered, but cartainly not the latter (a).

How far absence of title deeds is constructive notice of an equitable mortgage by deposit under the old law.

If the legal estate were acquired by a second mortgage or purchaser for value without notice, then the equitable mortgage fails. The question however arises as to what is notice, whether the absence of the title deeds and of enquiry for them is constructive notice, and how far constructive notice would suffice under the old law to preserve the priority of the equitable mortgage.

Moore v. Bank B. N. A.

In Moore v. Bank of British North America (b) it was considered that possession, prior to the act of 29 Vic., under a parol contract to purchase, there being no wilful or fraudulent abstaining from enquiry, was not sufficient constructive notice to take the case out of the old registry law in favor of the possessor, notwithstanding decisions in England and Ireland to the contrary. Still it may be that where a claimant subsequent to the equitable mortgage. who insists on priority under the old registry law, has made no enquiry for the title deeds, or received no reasonable excuse for their non-production, that subject to the question before referred to of necessity of registry of the memorandum of deposit, if any, the absence of such enquiry or excuse is constructive notice sufficient to deprive the claimant of the benefit of his prior registry; that such conduct might also bring the case within that class of cases referred to by Mowat, V. C. (c), as tantamount to actual notice or positive fraud, and, especially if coupled with other even slight circumstances, that the court would be "satisfied from the evidence that the party charged had designedly abstained from enquiring for the very purpose of avoiding notice" (d). In England this question has

<sup>(</sup>a) Harrison v. Armour, 11 Grant, 303; Wright v. Stanfield, 27 Bes. 8; Moore v. Culverhouse, 27 Bes. 639; Sug. V. & P., 14 ed., 727; Moore v. Bank B. N. A., 15 Grant, 308, and cases there cited; see this case in Appendix hereto.

<sup>(</sup>b) 15 Grant, 308, see this case in Appendix and cases there cited, as notice and priorities: also Chadwick v. Turner, L. R. 1, Ch. App. 310, and Foster v. Beall, 15 Grant, 244.

<sup>(</sup>c) Moore v. Bank B. N. A., supra, pp. 318, 319.

<sup>(</sup>d) Jones v. Smith, 1 Hare, 55; Sag. V. & P. 14 ed. pp. 783, 784

been expressly decided against the claimant guilty of such aches (a).

The next question is, how far the law is varied by the The present present act and that of 29 Vic., which on this point is registry law as to mort-dentical with the present act: how far the equitable gages by denortgagee, having no memorandum of deposit capable of posit of deeds. registry, is deprived of his priority where the person seeking to deprive him of it by force of the act has actual notice, or constructive notice of the character before reterred to as tantamount to fraud or actual notice; as for instance, where he should have said on acquiring his interest, he would prefer not to be told anything as to the title leeds. Whether also sec. 68 of the present act extends only to registered instruments whereon value is given.

only to registered instruments whereon value is given. Sec. 67 would not seem to apply in such case, as the equitable mortgagee has no "instrument" of which notice can be had. It has been said in a recent case (b) that the questions above referred to "may have hereafter to be carefully considered and to be decided," and the author abstains therefore from doing more than calling attention to them. It may be urged in favor of immateriality of notice, that the provision in sec. 53 of the former registry act (Con. Stat.), expressly saving the rights of equitable mortgagees, is expunged in this act; that if the doctrine of notice is to prevail, then this section works no change in the law: that in the next prior section (67), "actual notice" is expressly referred to, and that the doctrine of notice prevailing under the registry law has been regretted (c). As the question extends to all equitable liens, charges and nterests, it cannot fail shortly to receive the light of judi-

ial decision.

<sup>(</sup>a) Wormald v. Maitland, 13 W. R. 832; see also Re Allen, Irish tep. 1 Eq. 455: but that mere constructive notice will not suffice, and in isapproval of Wormald v. Maitland, see Russell v. Cashel, Trin. T. 867, in Ireland, before Brewster, C.

<sup>(</sup>b) McDonald v. McDonald, 14 Grant, 133.

<sup>(</sup>c) See Rt. Prop. Commissioners 2nd Rep., Bills, 1830-31, Vol. 2, p. 97, No. 85; also 2nd Rep. pp. 35, 40, and the Imp. Act. 13 & 14 Vic. h. 72, founded on the Report; see also Wyatt v. Bandell, 19 Ves. 439, er Sir W. Grant; Ford v. White, 16 Bes. 120, 123, 124.

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Consolidation of securities. tacking.

The following remarks in a recent case (a) will illustrate the law on the subject of consolidation of securities. "When one gives two mortgages for separate debts on distinct properties, if both mortgages are given to the same person. or become vested in the same person, the rule (independently of the registry law) is, that the mortgagor is not entitled to redeem the one mortgage without also redeeming the other; so that in effect, the holder of the two mortgages obtains a security on the property comprised in each mortgage, not only for the debt therein mentioned, but also for the debt mentioned in the other mortgage. This doctrine has been settled by a long series of binding decisions, commencing with a very early date; and the principle on which the doctrine was established was thus stated by the Lord Chancellor in Willie v. Lang (b). 'Every mortgagee when the mortgage is perfected, has acquired an absolute legal estate. Upon what terms can the court proceed to a redemption? By giving the mortgagee the value of his money, its fruit and his costs, and upon these terms only; for it is obvious injustice to help to the restitution of the pledge, without a full restitution of what it is first pledged for. If a person makes two different mortgages of two different estates, the equity reserved is distinct in each, and the contracts are separate; yet if the mortgagor would redeem one, he cannot; because, if you come for equity, you must do equity; and the general estate being liable for both mortgages, this court will not be an instrument to take illegally from a mortgagee, that by which he will be defrauded of part of his debt. If you come to redeem separately, you come for equity without doing equity; paying a debt, in lieu of which the mortgagee can hold both your estates until this court interposes (c). Learned judges have occasionally intimated some dislike of the rule (d),

<sup>(</sup>a) Buckler v. Bowman, 12 Grant, 457; see also Hyman v. Roots, 10 Grant, 340; Beevor v. Luck; L. R. 4 Eq. 537.

(b) 2 Ed. 73. (c) Vide Fisher on mortgages, secs. 689, 690; Tassil v. Smith, 2Dec. & J. 714; Selby v. Pomfret, 1 Johns and Hare, 336.

<sup>(</sup>d) But see Sober v. Kemp, 6 Hare, 158.

but they have uniformly acknowledged it to be the law of the court " (a).

This being so, and every one being presumed to know the law, persons dealing with a mortgagor after both mortgages have been given, are deemed so to deal "with knowledge that the two mortgages on the two estates, though then belonging to different mortgages might coalesce, and with knowledge of the possible consequences of their coalizion" (b). And such persons therefore, by taking a subsement conveyance or mortgage of one of the properties. ake it subject to the chance of the holder of the prior nortgage thereon, uniting with it any mortgage that the nortgagor may theretofore have given on any other property. To be safe, one who negotiates for a subsequent nortgage or purchase of any property, has thus to ascertain not only what prior mortgages there are on such property. but also what security the mortgagor has outstanding on other properties, unless he is himself prepared to buy up the prior mortgage on the property respecting which he is negotiating, or can secure himself against such prior mortgage being parted with by the holder (c).

The right to tack seems to be distinct from the right to Right to tack consolidate (d), and it may well be that although the for-distinct from mer is abolished the latter is not.

right to consolidate.

Under the former registry act, it was held that the abolished. right to consolidate continued, notwithstanding the language of section 56, reciting that tacking had been found productive of injustice, and giving priority according to time of registration; it was remarked however, that tacking was not in express terms abolished. Under the recent act, however, tacking is expressly abolished.

The right to tack to the mortgage debt, as against the Tacking inteheirs of the mortgagor, all arrears of interest recoverable overdue.

<sup>(</sup>a) Treson v. Denie, 2 Cox, 425; Vint v. Padget, 2 DeG. & J. 613; Tassel v. Smith, ib. 345; Hyman v. Roots, 10 Grant, 345.

<sup>(</sup>b) Vint v. Padget, 2 DeG. & J. 613; Beevor v. Luck. Lk. 4 Eq. 537.

<sup>(</sup>c) 1 J. & Hem, 336; Hyman v. Roots, 10 Grant, 340.

<sup>(</sup>d) Fisher on Mortgages, p 388; Buckler v. Bowman, 12 Grant, 462. lupra.

on the covenant of the mortgagor, though more than six years due, is before referred to (a).

27 & 28 VIC. CH. 31.

AN ACT RESPECTING SHORT FORMS OF MORTGAGES IN UPPER CANADA.

[Assented to 30th June, 1864.]

Preamble.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

Where words of the second Schedule are words in colinserted.

- 1. When a mortgage of real property in Upper Canada made of column one according to the forms set forth in the first schedule to this Act, or any other such mortgage expressed to be made in pursuance of employed, the this Act, or referring thereto, contains any of the forms or words have the same contained in column one of the second schedule to this Act. and effect as if the distinguished by any number therein, such mortgage shall be taken umn two were to have the same effect, and be construed as if it contained the form of words contained in column two of the same schedule, and distinguished by the same number as is annexed to the form of words used in such mortgage; but it shall not be necessary in any such mortgage to insert any such number.
- Mortgages fect under this Act how far valid.
- 2. Any such mortgage or part of such mortgage which fails to not taking ef- take effect by virtue of this Act shall, nevertheless, be as effectual to bind the parties thereto, so far as the rules of law and equity will permit, as if this Act had not been made.

Mortgage to include all houses &c., and the reversion, and all the estate. &c., of the grantor.

3. Every such mortgage, unless an exception be specially made therein, shall be held and construed to include all houses, outhouses, edifices, barns, stables, yards, gardens, orchards, commons. trees, woods, under-woods, mounds, fences, hedges, ditches, ways. waters, water-courses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to the lands therein comprised belonging, or in any wise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof, and if the same purports to convey an estate in fee, also the reversion and reversions, remainder and remainders, yearly and other rents. issues and profits of the same lands, and of every part and parcel thereof; and all the estate, right, title, interest, inheritance, trust, property, profit, possession, claim and demand whatseever

<sup>(</sup>a) p. 386.

at law and in equity, of the grantor in, to, out of or upon the same lands and every part and parcel thereof, with their and every of their appurtenances, subject always to the reservations, limitations. provises and conditions, contained in the grant of such lands from the Crown.

- 4. In the construction of this Act and schedules thereto, unless Construction there be something in the subject or context repugnant to such of words construction the word "lands" shall extend to all freehold tene "party." ments and hereditaments whether corporeal or incorporeal or any undivided part or share therein respectively; and the word 44 party" shall mean and include any body politic, corporate, or collegiate, as well as an individual.
- 5. In taxing any bill for preparing and executing any mortgage Remuneraunder this Act, the taxing officer, in estimating the proper sum tion for mortto be charged therefor, shall consider not the length of such this Act not mortgage, but the skill and labor employed, and responsibility to be taxed according to incurred in the preparation thereof.
- 6. The schedules and the directions and forms therein contained, Schedule. shall be deemed parts of this Act.

length only.

&c., to form part of Act.

### SCHEDULES TO WHICH THIS ACT REFERS.

## THE FIRST SCHEDULE.

This Indenture, made the day of thousand eight hundred and , in pursuance of the Act respecting short forms of mortgages, between (here insert names of parties and recitals, if any,) witnesseth, that in consideration of of lawful money of Canada, now paid by the said (Mortgagee or Mortgagees) to the said (Mortgagor or Mortgagors.) the receipt whereof is hereby acknowledged, the said (Mortgagor or Mortgagors) doth (or do) grant and mortgage unto the said (Mortgagee or Mortgagees) his (her or their) heirs and assigns for ever, all (parcels) (here insert previsos, covenants or other provisions.)

In witness whereof the said parties hereto have hereunto set their hands and seals.

#### THE SECOND SCHEDULE.

Directions as to the forms in this schedule, in cases of mortgage of real property:

1. Parties who use any of the forms in the first column of this

schedule, may substitute for the words "Mortgagor or Mortgagors," or "Mortgagee or Mortgagees," any name or names; and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

- 2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in any of the forms in the first column of this schedule; and corresponding changes shall be taken to be made in the corresponding forms the second column.
- 3. Such parties may introduce into, or annex to any of the forms in the first column, any express exceptions from or other express qualifications thereof respectively; and the like exception or qualifications shall be taken to be made from or in the corresponding forms in the second column.

COLUMN ONE.

COLUMN TWO.

1. And the said (A.B.) wife of the said Mortgagor hereby barsherdower in the said lands.

1. And the said (A. B.) wife of the said morgagor, for and in consideration of the sum of

of lawful money of Canada, to her in handle paid by the said mortgagee, at or before the scaling and delivery of these presents, the receipt where of is hereby acknowledged, hath granted and release and, and by these presents doth grant and release unto the said mortgagee, his heirs and assigns, all have dower and right and title which, in the event of surviving her said husband she might or would have to dower, in, to, or out of the lands and premises hereby conveyed or intended so to be.

2. PROVIDED. -This mortgage to be void on payment of (amount of principal money) of lawful money of Canada. with interest at (rate of interest) per cent. as follows: (terms of payment of principal and interest)

2. Provided always, and these presents are upon this express condition, that if the said mortgagor, his heirs, executors, administrators or assigns, or any of them, do and shall, well and truly pay or cause to be paid unto the said mortgagee, his executors, administrators or assigns, the just and full sum of (amount of principal money) of lawful money of Canada, with interest thereon, at the rate of (rate of interest) per cent. per annum on the day and time, and in manner following, that is to say (terms of payment of principal and interest) without any deduction, defalcation or abatement out of the ame, for, or in respect of any taxes, rates, levies, charge,

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rents, assessments, statute labor or other impositions whatsoever already rated, charged, assessed or imposed, or hereafter to be rated, charged, assessed or imposed by authority of Parliament or otherwise howsoever, on the said lands and tenements, hereditaments, and premises, with the appurtenances, or on the said mortgagee, his heirs, executors, administrators or assigns, in respect of the said premises. or of the said money or interest, or any other matter or thing relating to these presents, and until such default as aforesaid, shall and will, well and truly pay, do and perform or cause or procure to be paid, done and performed all matters and things in this proviso hereinbefore set forth, then these presents, and everything in the same contained, shall be absolutely null and void.

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3. And the said mortgagor doth hereby for him self, his heirs, executors and administrators, covenant, promise and agree to and with the said mortgagee, his heirs and assigns, in manner following, that is to say:

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4. That the said mortgagor, his heirs, executors, administrators or some or one of them shall, and will well and truly pay or cause to be paid unto the said mortgagee, his heirs, executors, administrators or assigns, the said sum of money in the above pro viso mentioned, with interest for the same as aforesaid, at the day and time and in manner above limited for payment thereof, and shall and will in everything, well, faithfully and truly do, observe, perform, fulfil and keep all and singular the provisions, agreements and stipulations in the said above proviso particularly set forth, according to the true intent and meaning of these presents, and of the said above proviso.

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5. And also, that the said mortgagor, at the time of the sealing and delivery hereof is, and stands solely, rightfully and lawfully seized of a good, sure, perfect, absolute and indefeasible estate of inheri-52

COLUMN ONE

#### COLUMN TWO.

tance, in fee simple of and in the lands, tenements, hereditaments, and all and singular other the premises hereinbefore described, with their and every of their appurtenances, and of and in every part and parcel thereof, without any manner of trusts, reservations, limitations, provisos or conditions, except those contained in the original grant thereof from the Crown or any other matter or thing to alter, charge, change, incumber or defeat the same.

- 6. And also, that the said mortgagor now hath in himself good right, full power and lawful and absolute authority to convey the said lands, tenements, hereditaments, and all and singular other the premises hereby conveyed or hereinbefore mentioned or intended so to be, with their and every of their appurtenances unto the said mortgagee, his heirs and assigns, in manner aforesaid, and according to the true intent and meaning of these presents
- 7. And also, that from and after default shall happen to be made of or in the payment of the said sum of money in the said above proviso mentioned, or the interest thereof, or any part thereof, or of or in the doing, observing, performing, fulfilling or keeping of some one or more of the provisions. agreements or stipulations in the said above proviso particularly set forth, contrary to the true intent and meaning of these presents, and of the said proviso, then, and in every such case it shall and may be lawful to and for the said mortgagee, his hein and assigns, peaceably and quietly to enter into, have, hold, use, occupy, possess and enjoy the aforesaid lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be, with the appurtenances, without the let, suit, hin. drance, interruption or denial of him the said mortgagor, his heirs, or assigns, or any other person or persons whomsoever.

6. And that he has the right to convey the said lands to the said mortgagee.

(Printed as amende 1 by 29 Vic. ch. 27.)

7. And that on default the mortgagee shall have quiet possession of the said lands.

8. Free from all incumbrances. 8. And that free and clear and freely and clearly acquitted, exonerated and discharged of and free

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COLUMN TWO.

all arrears of taxes and assessments whatsoever due or payable upon or in respect of the said lands. tenements, hereditaments and premises or any part thereof, and of and from all former conveyances. mortgages, rights, annuities, debts, judgments, executions and recognizances, and of and from all manner of other charges or incumbrances whatsoever.

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9. And also, that from and after default shall happen to be made of or in the payment of the said sum of money in the said proviso mentioned or the er assur- interest thereof, or any part of such money or interest or of or in the doing, observing, performing, fulfilling or keeping of some one or more of the provisions, agreements or stipulations in the said above proviso particularly set forth, contrary to the true intent and meaning of these presents and of the said proviso, then and in every such case the said mortgagor, his heirs and assigns, and all and every other person or persons whosoever, having, or lawfully claiming, or who shall or may have or lawfully claim, any estate, right, title, interest or trust of, in, to, or out of the lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be with the appurtenances or any part thereof by, from, under or in trust for him the said mortgagor, shall and will, from time to time, and at all times thereafter, at the proper costs and charges of the said mortgagagee, his heirs and assigns make, do, suffer and execute, or cause or procure to be made, done, suffered and executed, all and every such further and other reasonable act or acts, deed or deeds, devices, conveyances and assurances in the law for the further, better and more perfectly and absolutely conveying and assuring the said lands, tenements, hereditaments and premises with the appurtenauces unto the said mortgagee, his heirs and assigns, as by the said mortgagee, his heirs and assigns, or his or their counsel learned in the law, shall or may be lawfully and reasonably devised, advised or reCOLUMN ONE.

#### COLUMN TWO.

quired, so as no person who shall be required to make or execute such assurances, shall be compelled for the making or executing thereof, to go or travel from his usual place of abode.

10. And also that the said mortgagor will produce the title deeds enumerated hereunder and allow copies to be made at the expense of the mortgagee.

- 10. And also, that the said mortgagor and his heirs shall and will, unless prevented by fire or other inevitable accident, from time to time, and at all times hereafter, at the request and proper costs and charges in the law of the said mortgagee. heirs or assigns, at any trial or hearing in any action or suit at law, or in equity or other judicat \*\* re or otherwise as occasion shall require, produce every or any deed, instrument or writing hereunder written for the manifestation, defence and support of the estate, title and possession of the said mortgagee, his heirs and assigns of, in, to or out of the said lands, tenements, hereditaments and prem ises hereby conveyed or mentioned or intended so to be, and at the like request, costs and charges shall and will make and deliver or cause or procure tomade and delivered unto the said mortgagee, his heirs and assigns, true and attested or other copies or abstracts of the same deeds, instruments and writings respectively or any of them, and shall and will permit and suffer such copies and abstracts to be examined and compared with the said original deeds by the said mortgagee, his heirs and assigns.
- 11. And that the said mortgagor has done no act to incumber the said lands.
- at any time heretofore made, done, committed executed, or wilfully or knowingly suffered any act. deed, matter or thing whatsoever whereby or by means whereof the said lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be, or any part or parcel thereof. are, is or shall or may be in any wise impeached, charged, affected or incumbered in title, estate or otherwise howsoever.
- 12. And that the said mort-
- 12. And also that the said mortgagor or his heins shall and will forthwith insure, unless already in-

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COLUMN TWO.

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sured, and during the continuance of this security keep insured against loss or damage by fire, in such proportions upon each building as may be required by the said mortgagee, his heirs or assigns, the messuages and buildings erected on the said lands. tenements, hereditaments and premises hereby conveved or mentioned, or intended so to be, in the sum of of lawful money of Canada, at the least, in some insurance office, to be approved of by the said mortgagee, his heirs or assigns, and pay all premiums and sums of money necessary for such purpose, as the same shall become due, and will on demand assign, transfer, and deliver over unto the said mortgagee, 'his heirs. executors, administrators or assigns, the policy or policies of assurance, receipt and receipts thereto appertaining, and if the said mortgagee, his heirs or assigns shall pay any premiums or sums of money for insurance of the said premises or any part thereof, the amount of such payments shall be added to the debt hereby secured and shall bear interest at the same rate from the time of such payments, and shall be payable at the time appointed for the then next ensuing payment of interest on the said debt.

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13. And the said mortgagor hath released, remised and forever quitted claim, and by these presents doth release, remise, and forever quit claim unto the said mortgagee, his heirs and assigns, all and all manner of right, title, interest, claim and demand whatsoever, both at law and in equity of, unto and out of the said lands, tenements, hereditaments, and premises hereby conveyed or mentioned, or intended so to be, and every part and parcel thereof, so as that neither the said mortgagor, his heirs, executors, administrators or assigns, shall or may at any time hereafter have claim, pretend to, challenge or demand the said lands, tenements, hereditaments and premises, or

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COLUMN TWO.

any part thereof, in any manner howsoever subject always to the said above proviso; but the said mortgagee, his heirs or assigns, and the said lands, tenements, thereditaments and premises, subject as aforesaid, shall from henceforth forever hereafter be exonerated and discharged of and from all claims and demands whatsoever, which the said mortgagor, his heirs or assigns might or could have, upon the said mortgagee, his heirs or assigns, in respect of the said lands, tenements, hereditaments and premises, or upon the said lands, tenements, hereditaments and premises.

14. Provided, that the said mortgagee on default of payment for months, may on notice enter on and lease or sell the said lands.

14. Provided always, and it is hereby declared and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors or administrators shall make default in an S payment of the said money or interest or any part of either of the same according to the true inter and meaning of these presents, and of the provision in that behalf hereinbefore contained, and calendar months shall have thereafter elapsed, with out such payment being made (of which defaul as also of the continuance of the said principal money and interest, or some part thereof, on this security, the production of these presents shall conclusive evidence) it shall and may be lawful and for the said mortgagee, his heirs or assign => after giving written notice to the said mortgago his heirs or assigns, of his intention in that behalf either personally or at his or their usual or last place of residence within this Province not less the

previous, without any further conserst or concurrence of the said mortgagor, his heirs or assigns, to enter into possession of the said landstenements, hereditaments and premises hereby conveyed, or mentioned or intended so to be, and to receive and take the rents, issues and profits thereof, and whether in or out of possession of the same to make any lease or leases thereof, or of any part

COLUMN TWO.

thereof as he shall think fit, and also to sell and absolutely dispose of the said lands, tenements, hereditaments, and premises hereby conveyed or mentioned, or intended so to be, or any part or parts thereof, with the appurtenances by public auction or private contract, or partly by public auction and partly by private contract, as to him shall seem meet, and to convey and assure the same when so sold unto the purchaser or purchasers thereof, his heirs and assigns, or as he, she or they shall direct and appoint, and to execute and do all such assurances, acts, matters and things as may be found necessary for the purposes aforesaid, and the said mortgagee shall not be responsible for any loss which may arise by reason of any such leasing or sale as aforesaid, unless the same shall happen by reason of his wilful neglect or default; and it is hereby further agreed between the parties to these presents, that, until such sale or sales shall be made as aforesaid, the said mortgagee, his heirs, executors, administrators, or assigns shall and will stand and be possessed of and interested in the rents and profits of the said lands, tenements. hereditaments and premises in case he shall take possession of the same, on any default as aforesaid. and after such sale or sales shall stand and be possessed of and interested in the moneys to arise and be produced by such sale or sales or which shall be received by the mortgagee, his heirs or assigns, by reason of any insurance upon the said premises or any part thereof upon trust in the first place to pay and satisfy the costs and charges of preparing for and making sales, leases or conveyances as aforesaid. and all other costs and charges, damages and expenses which the said mortgagee, his heirs, executors, administrators or assigns, shall bear, sustain or be put to for taxes, rent, insurances and repairs, and all other costs, and charges which may be incurred in and about the execution of any of the trusts in COLUMN ONE.

#### COLUMN TWO.

him hereby reposed, and in the next place to pay and satisfy the principal sum of money and interest hereby secured or mentioned or intended so to be, or so much thereof as shall remain due and unsatisfied up to and inclusive of the day whereon the said principal sum shall be paid and satisfied; and after full payment and satisfaction of all such sums of money and interest as aforesaid, upon this further trust that the said mortgagee, his heirs, executors, administrators or assigns, do and shall pay the surplus, if any, to the said mortgagor, his executors, administrators or assigns, or as he shall direct and appoint, and shall also, in such event, at the request, costs and charges in the law of the said mortgagor, his heirs or assigns, convey and assure unto the said mortgagor, his heirs or assigns, or to such person or persons as he shall direct and appoint, all such parts of the said lands, tenements, hereditaments and premises as shall remain unsold for the purposes aforesaid, freed and absolutely discharged of and from all estate, lien, charge and incumbrance whatsoever by the said mortgagee, his heirs or assigns, in the meantime, so as no person who shall be required to make or execute any such assurances, shall be compelled for the making thereof to go or travel from his usual place of abode; provided always, and it is hereby further declared and agreed by and between the parties to these presents, that notwithstanding the power of sale, and other the powers and provisions contained in these presents, the said mortgagee his heirs or assigns shall have and be entitled to his right of fore, closure of the equity of the redemption of the said mortgagor, his heirs and assigns, in the said lands, tenements, hereditaments and premises as fully and effectually as he might have exercised and enjoyed the same in case the power of sale and the other former provisos and trusts incident thereto had not been herein contained.

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COLUMN TWO.

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nted as ided by 29 ch. 27,)

15. And it is further covenanted, declared and agreed by and between the parties to these presents. that if the said mortgagor, his heirs, executors or administrators, shall make default in payment of any part of the said interest at any of the days or times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee. his heirs or assigns, to distrain therefor upon the said lands, tenements, hereditaments and premises. or any part thereof, and by distress warrant, to recover by way of rent reserved, as in the case of a demise of the said lands, tenements, hereditaments and premises, so much of such interest as shall, from time to time, be, or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress, as in like cases of distress for rent.

Provided in default ie payit of the rest hereecured, principal bysecured l become able.

16. Provided always, and it is hereby further expressly declared and agreed by and between the parties to these presents, that if any default shall at any time happen to be made of or in the payment of the interests money hereby secured or mentioned, or intended so to be, or any part thereof, then and in such case the principal money hereby secured or mentioned, or intended so to be, and every part thereof, shall forthwith become due and payable in like manner and with the like consequences and effects to all intents and purposes whatsoever, as if the time herein mentioned for payment of such principal money had fully come and expired, but that in such case the said mortgagor, his heirs or assigns shall, on payment of all arrears under these presents, with lawful costs and charges in that behalf, at any time before any judgment in the premises recovered at law or within such time as by the practice of equity relief therein could be obtained, be relieved from the consequences of non-payment of so much of the money secured by these presents, or

COLUMN ONE.

COLUMN TWO.

mentioned, or intended so to be, as may not then have become payable by reason of lapse of time.

17. Provided, that until default of payment the mortgagor shall have quiet possession of the said lands.

17. And provided also, and it is hereby further expressly declared and agreed by and between the parties to these presents, that until default shall happen to be made of or in the payment of the said sum of money hereby secured or mentioned, or intended so to be, or the interest thereof, or any part of either of the same, or the doing, observing, performing, fulfilling or keeping some one or more of the provisions, agreements or stipulations herein set forth, contrary to the true intent and meaning of these presents, it shall and may be lawful to and for the said mortgagor, his heirs and assigns, peaceably and quietly to have, hold, use, occupy, possess and enjoy the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, with their and every of their appurtenances, and receive and take the renta issues and profits thereof to his own use and benefit, without let, suit, hinderance, interruption or denial of or by the said mortgagee, his heirs, executors, administrators or assigns, or of or by any other person or persons whomsoever lawfully claiming, or who shall or may lawfully claim by, from, under or in trust for him, her, them or any or either of them.

The Act 27 & The forms given in the act respecting short forms of mortages (27 & 28 Vic. ch. 31) differ occasionally from the most short forms of approved forms in England, and as they are at variance with some of the suggestions heretofore made, it may be requisite to consider them. The statute may be of service to the draftsman, and save expense in registry, but it is unfortunate that the all-important power of sale is not in better form, and attention must be paid to one or two inconsistencies, which will be presently pointed out.

Precautions Great care is requisite if the short forms in column one as to varying are to be in any way varied from, to suit particular circular ci

inces; the act provides that "parties may introduce r annex to any of the forms in the first column any s exceptions from or other express qualifications f respectively, and the like exceptions or qualificahall be taken to be made from or in the corresponding in the second column"; if therefore the alteration s not an exception or qualification within the above then the particular covenant or clause will it would e without the act, and left to the ordinary meaning words used (a).

ay be questioned whether the act applies to lease- The act does

iterests, for though by a liberal construction the term not apply to leaseholds. property" in the first clause might include chattels aided by the context in the act, the inference to be from the context is the other way. The whole frame statutory form is applicable to a freehold interest in clause 4 the word "lands" is made to extend to d interests only; and there is the absence of any on, as in the act relating to short forms of leases, that e the premises are of freehold tenure the covenants e taken to be made with, and the proviso for re-entry to, the heirs and assigns of the lessor, and where of a old tenure to his executors, administrators, and In strictness the term "real property" does not personal property (b). It has been held also that olds will not pass under a general devise of "real esinless aided by other words (c). Till decision to the

ise 2 it will be observed does not extend to per-Cl. 2 does not ice of covenants, as for instance to keep up a life or extend to desurance, and repay the mortgagee any premiums he nants, its apay on default of the mortgagor. Inasmuch as this taxes. applies at most only to payment of taxes till default

ges of leasehold.

ry, it would be advisable not to apply the act to

se remarks on the act as to short forms of conveyances, ante (b) Williams Real Prop. 8 ed. p. 8. wift v, Swift, 1 D. F. & J. 160.

in payment of principal or interest, it would appear that under none of the forms would the mortgagor be liable to the mortgagee for taxes, &c., after default. In requiring the mortgagor to pay assessments that may be imposed on the mortgagee in respect of the mortgage money or interest it would seem to go too far; interest on mortgages being assessable by the Act of 32 Vic. ch. 36. Sale See 21% sug

Clauses 8 & 4 covenants for payments to heirs.

Notwithstanding that by clauses 3 and 4 the covenant for payment is made to the mortgagee and his heirs, it is clear should not be that the personal representatives will not be deprived thereby of their ordinary right to the moneys as being personalty, or of the right to sue for them in their own names. Assuming that the interest conveyed is one of freehold, then the word "heirs" is, as regards all the other covenants, the appropriate word, as such covenants (including perhaps that for insurance) run with the lands and go to the heir.

Clauses 7, 14 & 17 conflict possession; should be varied.

Clauses 7, 14 and 17, conflict with each other as to the as to right to right of possession. Clause 7 gives the mortgagee right to possession in default of payment of principal or interest, and also apparently of taxes and statute labor: clause 14 gives the right only after default in payment of principal or interest, and then only after a certain written notice: clause 17 on the other hand, allows the mortgagor right to possession till default of payment of principal or interest, or in observ-Thus the right of the mortgagee to posance of covenants. session is more extensive under the general effect of the conveyance to him and of clause 17 negativing his right to possession, than under the positive effect of clauses 7 and 14 giving him the right to enter. If these various clauses be used together without any modification, as it is probable they frequently will be, then it would seem that they may yet Thus suppose the tovenant to a great extent be reconciled. to insure be inserted, and default be made therein by the mortgagor, whereon the mortgagee should bring ejectment: the mortgagor would contend that clauses 7 and 14, which give a right to the mortgagee to enter do not extend to breach of covenant, and that clause 14 requires written notice to be given before entry: the proper answer of the

mortgagee apparently would be, that the effect of the convevance is to give him the immediate estate and right to possession: that such effect is controlled solely by clause 17 which allows the mortgagor possession only till breach of covenant; that there is no other clause giving possession any to the mortgagor, and consequently the general effect of the conveyance must govern; and so far as regards clauses 7 and 14, that they do not expressly negative any right the mortgagee otherwise has, nor do they positively confer any right to possession on the mortgagor; that clause 7 operates only as a covenant for quiet enjoyment against interruption. not to come into operation on default of the covenant to insure (to which it does not extend), but only on default in payment of the mortgage moneys, taxes or statute labor. and "in the meanwhile, though the mortgagee is equally to have power to enter and enjoy the land, yet he must content himself with his own title against interruption by strangers there being no covenant by the mortgagor to protect him during that period: whereas if he be disturbed after default in the covenant to insure he may have recourse to his remedy on the covenant" (a). Clause 14 is capable perhaps of a somewhat similar construction; at any rate it would seem that on breach of the covenant, the mortgagee might eject, though no default were made in payment of the mortgage moneys, taxes or statute labor.

Clause 9, being the covenant for further assurance, is made Cl. 9, objecto operate only after default; in this respect it is "objectionable as tionable, as it might well happen that some act for further assurance might be required to be done before default" (b). It need hardly be mentioned that, so long at least as the equity of redemption subsists, the mortgagor cannot under this covenant be required to convey except subject to the proviso for redemption; nor can be be required after default to release his equity of redemption.

<sup>(</sup>a) Doe d. Roylance v. Lightfoot, 8 M. & W. 553, in which case there was no right to possession given to the mortgagor, but the covenant for possession was that after default the mortgage might enter, possess, &c.; the question was whether the mortgagee had right immediately on execution of the deed, or only after default—see ante p. 389.

<sup>(</sup>b) Davidson Convey. 2 ed. vol. 2, 579.

Cl. 10 should not be adopt-

Clause 10, that the mortgagor will produce title deeds is a clause which, without some explanation, might strengthen a practice unfortunately still too prevalent, viz., that the title deeds may be left in the hands of the mortgagor. This should never be permitted, if only (apart from other reasons) on the ground of the frequent impossibility of ever afterwards obtaining any production of the title deeds, and the consequent depreciation in the value of the property, and difficulty in carrying out a sale. When the mortgagor makes default, and the mortgagee proceeds to enforce his claim by foreclosure or sale, an hostility frequently springs up, and the mortgagor, so far from producing the title deeds, does all in his power to thwart the The remedy on the covenant will frequently be found useless, and when a foreclosure or sale has to be resorted to the mortgagor is generally in such circumstances that, on a sale, any proceedings on the covenant to produce. only entail expense on the mortgagee, and on a foreclosure any order for delivery up of the title deeds might be of no The Legislature never intended, by inserting this form of covenant, to sanction the practice of leaving the title deeds in the hands of the mortgagor. The form may be of service where the title deeds cover other property to be retained by the mortgagor and not included in the mortgage; or where the mortgagor has sold part of the property covered by the title deeds, and himself given his vendee a covenant to produce. Even in these cases a prudent mortgagee will obtain possession of the title deeds to himself, or at least to some trustee for both parties: when the mortgagor objects on the ground that the deeds cover other property, the mortgagee may himself offer to covenant to produce; and when the objection is that the mortgagor has covenanted to produce to a former purchaser, the mortgagee may urge that that covenant would also be binding on him during the continuance of his estate as running with the lands (a).

<sup>(</sup>a) Sugden Vendors, 14 ed. 453. It must not be supposed that the fact of a vendor having given a covenant to produce on sale of part of the

Clause 12. The nature of the covenant to insure has been cl. 12 as to It will be observed that the statu- insurance. already considered (a). tory form is framed rather to meet the case of a future than of an existing insurance. If at the time of the mortgage there be a policy of insurance, and the same be not actually assigned to the mortgagee, it may be questionable how far this clause will be of any avail to him as regards that specific policy, as the mortgagor only covenants to insure "unless already insured;" and so far as regards that part of the covenant which is to keep insured and assign the policy it may be contended it does not apply to the case of a policy existing at the time of the covenant, as the covenant contemplates a future policy in such proportions and in such office as the mortgagor thereafter may require (b).

Nothing is said in this form as to how the insurance moneys that may be paid on any loss are to be applied (c): clause 14, it is true, does provide to a certain extent for application of the moneys, but it would not reach the case of insurance moneys received before default by the mortgagor, but is apparently confined to the position of the mortgagee after sale under the power.

Clause 14 conferring the power of sale and providing for Cl. 14, the application of moneys is one which varies much from the badly framed. modern approved forms. The objections will be understood from what has been before explained in treating of the power of sale (d). It conflicts apparently as regards right to possession with clauses 17 & 7 (e). It does not extend to breach of covenants as do clauses 17 & 7. The power

property, entitles him, on sale of the residue, to retain the title deeds to answer his covenant; in the absence of any contract on the subject, it would seem he will have to deliver them over to the purchaser of the residue, he can neither retain them or deliver them to the first purchaser. The vendor would however, in such a case be entitled to have the covenant recited in the conveyance of the residue, or endorsed on it, so as to create notice, and might fairly require a covenant from the purchaser to perform it: Sugden Vendors, 14 ed. 434.

<sup>(</sup>a) Ante p. 363.

<sup>(</sup>b) See 29 Vic. ch. 28, s. 7, ante p. 11.

<sup>(</sup>c) As to necessity for this see ante p. 366. Austin v. Story, 10 Grant, (d) Ante p. 373. (e) Ante, p. 420.

Clause 14.
The power of sale.

should be given to the personal, not to the real representatives (a). It should especially not be dependant on notice. but the provision as to notice should be by a covenant by by the mortgagee that notice shall be given; and the purchaser should be expressly relieved from any necessity as to seeing that notice was given (b). There is no power to the mortgagee to buy in at auction and re-sell without being responsible for loss or deficiency on re-sale (c); or to rescind or vary any contract of sale that may have been entered into: or to sell under special conditions of sale (d), (the latter however may be permissible when the conditions are not of a depreciatory character). The application of insurance monies is not sufficiently provided for (e); nor would they be received by the heirs (as assumed by the clause). but by executors, if payable to any representatives of the mortoagee. The surplus of sale should not be made payable exclusively to the personal representatives, for on sale after death of the mortgagor, the heirs are entited to the surplus (f); in this respect the form might mislead the mortgagee to his prejudice. There is no clause relieving a purchaser from seeing that default was made, or notice given, or otherwise as to the validity of the sale; the importance and benefit of which to the mortgagee, and even to the mortgagor, was before alluded to (g). The provision that the giving the power of sale shall not prejudice the right to foreclose is unnecessary (h). It is perhaps to be regretted that a better form of power of sale had not been adopted (i).

<sup>(</sup>a) Ante p. 373.

<sup>(</sup>b) Ante p. 375.

<sup>(</sup>c) Jarman Byth. Con. by Sweet 3 ed, vol. 5, p. 567, n. b, and p. 412; see also ante p. 375 n. c.

<sup>(</sup>d) As to the object of these provisions, see p. 375 n. c.

<sup>(</sup>e) Ante p. 366. (f) Ante p. 377. (g) Ante p. 365.

<sup>(</sup>h) Jarm. Byth. Conv. by Sweet, 3 ed. vol. 5, p. 108.

<sup>(</sup>i) The very general practice now is to adopt the forms given by the statute, and in ordinary cases to fill up a printed form of mortgage. This is found to save both time and expense, especially now that all mortgage have to be prepared in duplicate, and registered in full. Where the parties desire to adopt a printed short form under the act, the practice of the author is to add a short proviso, that in case default be made in paper.

Clause 17. The inconsistency as to right to possession be- Cl. 17. as to tween this section and sections 7 and 14 has been before possession alluded to (a). It would seem that this section is not open to with clauses the objection of being invalid for the purpose intended; viz., 7 & 14. to operate as a redemise to the mortgagor; or of operating further than as creating tenancy at will. The nature of this objection has been fully explained (b): it suffices here to ay that the argument in favor of the objection would be, that, as the right of possession and demise to the mortgagor s till default in payment of principal, or interest, or in oberving covenants, the demise is void for uncertainty as to he term of its duration. It is apprehended however, that hough such objection would hold good if the right of posession were given only till default in observing covenants, nd the covenants or any of them were uncertain in their nature as to the time of their performance or of breach. till, as in this section, a certain day is named for payment of principal, it will operate as a valid demise and creation of a term till that day, subject to be defeated in the meantime on non-observance of covenants or non-payment of interest (c).

29 VIC., CH. 27.

An Act to amend the Act respecting Short Forms of Mortgages in Upper Canada.

[Assented to 18th September, 1865.]

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. The form of words numbered six in column number one of Schedule 2 of the second schedule of the Act, passed at the Session of the Par-Act, 27, 28, V. c. 31 amended.

ment of either principal or interest for —— months after the same is payable, the power of sale may be acted on without any notice, and that any contract of sale may be varied or rescinded, and the mortgagee, &c., may my in and resell without being responsible for any loss or deficiency on retale. To this may be added, if thought proper, the clause before referred to relieving the purchaser from seeing that the events have happened on which a sale may be had, and as to regularity of the sale.

<sup>(</sup>a) Ante p. 420. (b) Ante p. 389.

<sup>(</sup>c) Ante p. 389; and Royal Cahadian Bank v. Kelly, 19 C. P. U. C. 196, ante p. 383.

liament of Canada, held in the twenty-seventh and twenty-eighth years of Her Majesty's Reign, chapter thirty-one, intituled: An Act respecting Short Forms of Mortgages in Upper Canada, in hereby amended, by substituting the word "Mortgagee" for the word "Grantee" therein.

Further 2. The form of words numbered fourteen in column numbers amendment of two of the second schedule of the English version of the said Active said Schedule. "assigns" in the twenty-third line of such form of words, and substituting therefor the word "of."

Further 3. The form of words numbered fifteen in column number One amendment of of the second schedule of the said Act, is hereby amended, by substituting the word "mortgagee" for the word "mortgagor" therein.

# MEMORIALS AS EVIDENCE. (a)

subject is treated of. 1st. as to the search requisite to secondary evidence; 2nd, how far a memorial execur a grantor is evidence of the matters therein stated: ow far it is evidence if executed by a grantee; 4th, stinction between the evidence furnished by a memoejectment, and as between a vendor and purchaser. ler the act for quieting titles; and 5th, as to proof of

It frequently happens that secondary evidence of a As to search. g document or title deed is rejected in consequence insufficiency of the search for the original.

ties who search for a missing conveyance with a view Owner of first in secondary evidence should bear in mind that the estate of free-hold entitled entitled to the first immediate estate of freehold is to the custody rson entitled to retain the custody of the title deeds as against inst those entitled to ulterior estates in remainder or those in ion; and that the deeds are presumed to follow the Title deeds nd to go into the custody of those entitled (b). When presumed to nd descends to real representatives, they, and not the be in custody of those ential representatives, are entitled to the deeds, though tled to them, eater certainty a search with the latter would be ble, especially in the case of a missing mortgage. The How prenption that the deeds follow the title and go to him sumption destroyed. ed may be destroyed; as for instance, by the fact that sale by owner overed other lands retained by the vendor (c); or that of part.

The importance of this subject has induced the author to add this , which in January, 1868, he published in the Upper Canada Law

Moriarty v. Grey, 12 Ir. C. L. Rep. 141, per O'Brien, J.; Sug. s, ch. 11, s. 4; see also Marvin v. Hales, 6 U. C. C. P. 211, post; Sug. ch. 11, sec. 4, cl. 23, as to the right to the deeds of the or releasee to uses.

Tea v. Field, 2 T. R. 708.

Covenant to produce by a former owner.

some prior owner on conveyance by him of a portion gave Where a vendor on sale of a part a covenant to produce. of his lands retains the deeds and gives a covenant to produce, it does not follow that on conveyance of the residue. the title deeds remain with him to answer his covenant to produce: on the contrary, it would seem that in the absence of stipulation, the vendee of the residue will be entitled to the deeds even against the prior vendee, and be bound by the covenant to produce as running with the lands (a). A learned Judge whose position before his elevation to the Bench was such as to have given him great practical experience, has expressed his recollection of the practice, however, as follows: "I think it used to be the practice, when the owner of a lot of land sold half of it, to retain the conveyance to himself; and in the event of his selling the other half, to give that conveyance to the purchaser of the second half (b)." This dictum had no reference to the vendor having on the first sale given a covenant to produce, and was by way of suggestion to the parties as to further search for a missing conveyance, of which no evidence other than a memorial signed by the grantee was given. of part of the estate in lots without any stipulation as to the deeds, the holder of the portion of the highest value is entitled to the custody, whether seller or purchaser, giving Of joint owners, or Joint owners, the other a covenant to produce (c). tenants in common, coparceners and joint tenants, whichever of them obtains possession of the deeds is entitled to retain them, and the presumption would be that they would go to the grantee or heir at law of the possessor, except in the case of joint tenants, whose heir at law would not be entitled.

who entitled to title deeds.

> Where the instrument, if subsisting, should be in possession of the party himself to the cause, who desires to give secondary evidence, the proper course is that he should search

Search by the party to the cause among his own papers, how made.

<sup>(</sup>a) Ante, p. 422, n. a.

<sup>(</sup>b) Wishart v. Cook, 15 Grant, 237.

<sup>(</sup>c) Sugden Vendors, ch. 11, s. 4, cl. 4.

with a witness, and that the search should be "so conducted and in such places as to afford a reasonable ground for concluding that it was made bona fide, both as regards the witness and as regards the party, by giving and using all possible facilities for making it effectual." If he should himself have searched accompanied by a witness, but the witness should have made no search, and have accepted the statement of loss of such party as true, the search will not be sufficient (a).

It may sometimes be that as against a person claiming Notice to prothe freehold mere notice to him to produce may suffice. duce. without evidence of search, on the presumption above referred to, that the deeds follow the title and are in the possession of the party to whom notice is given (b); for search would be useless with prior owners when the law would presume the title deeds were not with them, but passed from each prior owner to his grantee. That notice to produce alone should suffice, there must be nothing to destroy the presumption that the deed followed the title, as, for instance, a covenant to produce given by a prior owner.

On a question of sufficiency of search, and proof of loss to What is suffilet in secondary evidence, Richards, C. J., in a recent case (c) cient search. expressed himself as follows: "In Reg. v. The Inhabitants of Kenilworth (d), Lord Denman, in reference to a general rule established as to what is established as to what is a sufficient search to let in secondary evidence said, 'I think that no general rule exists. The question in every case is whether there has been evidence enough to satisfy the Court before which the trial is had that, to use the words of Baily, J., in Rex. v. Denis, 'A bona fide and diligent

<sup>(</sup>a) Bratt v. Lee, 7 U. C. C. P. 280.

<sup>(</sup>b) See Marvin v. Curtis, 6 U. C. C. P. 212.

<sup>(</sup>c) Russell v. Fraser, 15 U. C. C. P. 380. See also as to search, Ansley v. Breo, 14 U. C. C. P. 371; Gathercole v. Miall, 15 M. & W. 319; Doe d. Padwick v. Wittcomb, 6 Ex. 601; 4 H. L. Ca. 425, S. C.; Taylor on Evidence, p. 423, 5th ed.; Smith v. Nevilles, 18 U. C. Q. B. 473; Best on Evidence, 4 ed. 606; Martin v. Hales, 6 U. C. C. P. 203; Marvin v. Curtis, id. 212; Bratt v. Lee, supra, 7 U. C. C. P. 280.

<sup>(</sup>d) 7 Q. B. 642.

cient search.

what is suffi- search was made for the instrument where it was likely to be found. But this is a question much fitter for the Court which tries than for us. They have to determine whether the evidence is satisfactory, whether the search has been bona fide, whether there has been due diligence, and so on. It is a mere waste of time on our part to listen to special pleading on the subject. To what employment shall we be devoted, if such matters are brought before us as matters of law? The Court below must exercise their own judgment as to the reasonableness of the search, taking into consideration the nature of the instrument, the time elapsed and numerous other circumstances, which must vary with every case."

> "As to the diligence in the search necessary to let in secondary evidence, the following quotation from Taylor on Evidence seems to lay down the proper principles to be acted on by the Courts: 'What degree of diligence is necessary in the search cannot easily be defined, as each case must depend on its own peculiar circumstances; but the party is generally expected to shew that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. As the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and as this is a preliminary enquiry addressed to the discretion of the judge, the party offering secondary evidence need not on ordinary occasions have made a search for the original decument as for stolen goods, nor be in a position to negative every possibility of its having been kept back."

> In a recent case (a) the following remarks were made:-"I think the only question is, if sufficient search has been made for the original. Now to determine this it must be shewn that search has been made where the instrument would most probably be. It is for the presiding Judge to decide whether reasonable evidence has been given to

<sup>(</sup>a) Reg. v. Hinckley, 8 Law Times, N. S. 270.

satisfy his mind that the document has been lost. is also a mixed question of law and fact which the Court can subsequently review."

2nd. When sufficient evidence has been given of destruc- Memorials as tion of the original document, or of search and loss to let in evidence. secondary evidence (a), memorials afford, in cases of convevance, a frequent means of furnishing such evidence, and are admissible or not, and if admitted, have a probative effect according to the circumstances.

When the plaintiff sought to make the defendant liable as Mem. signed assignee of a term on the covenants contained in a lease, by grantor assignee of a term on the covenants contained in a lease, by grantor and gave notice to produce the assignment, and then evi-dence against dence by a memorial signed by the assignor, and further grantee, evidence that the defendant had taken proceedings in Chancery as assignee, the Court held that the memorial alone was not sufficient, but that coupled with the other facts of the case there was sufficient evidence to go to a jury (b).

Sir J. B. Robinson, C. J., in an ejectment suit (c) wherein nor against the plaintiff sought to give in evidence a memorial signed strangers without acby a grantor, under whom he claimed, but with whom the counting for defendant who shewed no title was not in privity. after original. stating that there was not sufficient evidence of search to dispense with production of the original deeds, thus expresses himself:

"I have sometimes thought that such evidence as was offered in this case might without danger be admitted to prove the fact of the conveyance being made which is recited in the memorial, especially as against a defendant who has no title in himself; but the Legislature has not thought proper to make such evidence admissible without accounting for non-production of the deed, as is done with respect to bargains and sales enrolled under Stat. 10 Anne, ch. 18, s. 3."

<sup>(</sup>a) As to memorials as primary evidence, see 1 Tayl. Ev. 405, 4th ed.; White v. Pike, Coo. & Al. 70, per Bushe, C.J.; Cathrow v. Eade, 4 DeGex & Sm. 527, per Knight Bruce, V.C.; Marvin v. Hales, 6 C. P. U. C. 211, per Draper, C. J.

<sup>(</sup>b) Jones v. Todd, 22 U. C. Q. B. 53.

<sup>(</sup>c) Smith v. Nevilles, 18 U. C. Q. B. 473.

Memorial signed by rantor who had but possession in law condary evidence against strangers.

Where the non-production of the original instrument was satisfactorily accounted for a memorial signed by a grantor who was not shewn to have had more than mere construcheld good se- tive possession by force of the conveyance to him, has been held to be evidence not merely against the grantor and all claiming under or in privity with him, but also against third persons not appearing to have any title whatever except a bare possession of insufficient duration to confer a title, as being a statement and act by the party in possession against his own interest as reputed owner of the This case is important as shewing that the memorial is evidence even though the grantor executing i never had more than constructive possession (for the land were wild lands, and no evidence was given as to posse sion); and that under such circumstances it is eviden even against one not proven to claim in privity with the Memorial by grantor. In a case in equity (b) between vendor and purgrantor not in actual posses-chaser on objections that an original deed which apparently sion, and long could only operate by way of bargain and sale was not possession under the allog- forthcoming, and that the memorial signed by the grantor ed deed, the did not shew any valuable consideration to raise the use, court inferred the Court (adjudicating both on the law and the facts) admitted the memorial, and from the fact of possession having gone with the alleged deed for sixty years inferred the fact

possession unvalue given.

> The weight of authority is in favor of taking a memorial executed by a grantor in possession, actual or constructive, and against his interest, as good secondary evidence, even against strangers, without corroborative evidence.

> have been no objection on the grounds hereafter alluded to. viz., that the conveyance might have been for life only, or

> here, as in Russell v. Fraser, the alleged grantor was not shewn to have had more than constructive possession.

There seems moreover to

It is to be observed that

of sufficiency of consideration.

with a shifting use, or in trust.

<sup>(</sup>a) Russell v. Fraser, 15 U. C. C. P. 375, and cases there referred to; Carthrow v. Eade, 4 DeG. & Sm. 531; Moriarty v. Grey, 12 Irish C. L. Rep. 129; Moulton v. Edmonds, 29 L. J. Ch. 181; but see as regards third persons Doe d. Loscombe v. Clifford, 2 C. & K. 452; Hayball v. Shep. herd, 25 U. C. Q. B. 536. As to constructive and actual possession, see p. 120, n. a. (b) Thompson v. Millikin, 9 Grant, 358.

If the memorial without referring to an antecedent instrument, simply shewed a bargain and sale of the lands made on a certain day, between certain parties, for money paid, the party tendering it might perhaps as a last resource centend that the memorial itself was a good conveyance by way of bargain and sale, as being per se sufficient to satisfy the Common Law and Statute of Frauds. Formerly a mere bargain or sale for money raised a use, and the bargainor held for the use of the bargainee; the Statute of Uses executed this use, and gave the legal estate bargained for to the bargainee. The Statute of Frauds required writing and the signature of the party creating the estate: though perhaps a seal only might suffice (a). The Statute of Enrolments, it is true, required that a bargain and sale of a freehold should be by deed indented and enrolled; but neither enrolment, nor registry to supply enrolment, are required here (b), and a deed poll suffices (c).

3. Many of the principles whereon a memorial signed by Memorial a grantor is admissible as evidence of a conveyance by him, grantee, do not apply where it is executed by a grantee. latter case it is a statement, not against, but in support of evidence towards proof interest, and by a person not then in possession. Still such under certain a memorial, if coupled with other facts confirmatory of the circumstances instrument set out in it, is admissible as parcel of the evi-strangers, but dence towards proof.

In the has been held not simply per se.

A memorial executed by a grantee through whom a person claims, coupled with possession taken under the instrument to which it relates, and enjoyed for a length of time in a mode such as to preclude the probability of the instrument being other than as set forth by the memorial is good evidence, even against strangers, especially if accompanied by other corroborative facts; but the mere memorial without more would be evidence only against those claiming under or in privity with the grantee.

<sup>(</sup>a) Ante, p. 60.

<sup>(</sup>c) Ante, p. 91.

Memorial signed by grantee unac- mation. possession taken under rated, insuffi-

On this head a recent case (a) affords most useful infor-The plaintiff in ejectment claimed under a deed companied by from one Arnold to one Gough, which he did not produce, and of which he offered as secondary evidence a memorial alleged deed, produced from the Registry Office, executed by Gough, the wise corrobo-alleged grantee, with an affidavit of execution of the original deed by Arnold endorsed. The following is the judgment of the Court, delivered by Hagarty, J.:

> "No possession appeared to have heen taken under the alleged conveyance, and the title is now for the first time after a lapse of 53 years, sought to be established to a valuable property on this evidence.

> The plaintiff's proposition may be thus stated, that on a witness proving that he saw a deed apparently answering the description contained in the memorial, and its loss without further proof of hand-writing or genuineness, a memorial in the county registry executed by the grantee only, and proved by an affidavit endorsed of a witness who swore that he saw the conveyance duly signed by the grantor is, in the absence of any act done or possession taken, good secondary evidence of the original conveyance, and that a court and jury should be reasonably satisfied of the fact of such a deed having been duly executed, and that the estate duly passed thereunder. The proposition is startling, and can hardly be adopted except on the surest basis of reason and authority.

> The first case I would refer to is (b) appealed from the Irish Chancery to the Lords, 1825.

> In 1816 a bill was filed setting up a marriage settlement executed in 1760, of which a memorial was registered in 1763. James Scully was alleged to have thereby covenanted with Lyons, father of the plaintiff, to settle on her (his intended wife) either by deed in his lifetime or by will, one-third of his estate. The memorial was only executed by Lyons the trustee. He died No deed was executed in grantor's lifetime.

<sup>(</sup>a) Gough v. McBride, 10 U. C. C. P. 166.

<sup>(</sup>b) Scully v. Scully, 10 Irish Eq. Rep. 557.

in 1816, and by his will left a large annuity to plaintiff 'in full satisfaction of her claims on his property under her marriage articles or otherwise.' She filed a bill asking to have her one-third under the articles. The defendant induced her to sign a memorandum on the will agreeing to confirm and abide by it. She charged that one Mahon, who took largely under the will, and was residuary devisee, had possession of the articles or knew where they were, and evidence was given to prove search, and that Mahon had declared he had either burned or thrown them away. The defendant admitted that they knew she claimed some right to testator's property in his life-time, but that she had solemnly assured him that she would waive all her rights and abide by his will on receiving the annuity of £1,000, and testator on the faith thereof made his will.

Lord Chancellor Manuers decreed in her favor, and considered the articles proved. In the Lords the case is argued at great length by Mr. Sudgen and Sir C. Wetherall. Lord Eldon says: 'The question in every case of this sort is whether all the testimony taken together offered as secondary evidence, is or is not sufficient to enable you to say that as you have not the writing itself you will act upon it as if you had it before you, and with an absolute certainty of what these articles contained. It is strongly the inclination of my opinion that this memorial does contain what were the articles of agreement between the parties.' Again he says: 'There is not a single witness who speaks to conversations between plaintiff and testator, who does not characterize him as proposing to her a choice of what was in the will or a one-third of the property as stated in the articles.'

The defendant's counsel admitted in argument, 'that the husband executed an article I cannot deny, for I cannot deny what the will says.' The decree was affirmed.

In 1837, the case of Peyton v. McDermott (a) was decided by Lord Chancellor Plunkett. It was attempted to set up marriage articles executed in 1765. The Chancellor

<sup>(</sup>a) 1 Drury and Walsh, 198,

says: 'I find possession going along with these articles. Again, I have strong evidence under the will of H. O'Rorke (the settlor), of the existence of these articles, as by a reference to them, the otherwise apparent obscurity and confusion in that will and its limitations are explained and rendered plain.' This was a very peculiar case in its facts.

The case of Biggs v. Sadlier, decided in Ireland in 1847 (a), enters very fully into the law on this head. It came before the House of Lords in 1853 (b). A memorial signed only by grantee was recorded in 1746. For one hundred years possession had gone in accordance with the facts it recited. The question was whether the original lease, of which it professed to be a memorial, contained a clause for perpetual renewal on the dropping of lives. Many renewals had been made under it from time to time. Proceedings had been taken to enforce a renewal in 1799, and a renewal obtained.

Lord St. Leonards says: 'It has been made a great question in reference to the memorial, which is signed only by the party who takes the interest, whether that of itself by its own force shall be considered as binding the estate of the grantor? That is a totally different question from that which is now before your lordships, because here the question is, whether or not the memorial can be considered as secondary evidence of the contents of the instrument of 1746, and considering the length and nature of the deeds by which it has been recognized, and considering the statute itself under which that memorial was enrolled, and the proof which accompanies that memorial, and bearing in mind too that of course every memorial is signed by the person who takes the interest, because it is he, and not the grantor, who wants the protection of the register, I certainly am of opinion, and I think the authorities will not impeach that opinion, that this memorial is good secondary evidence of the contents of the deed of 1746, it being proved upon search, that the deed has actually been lost.'

<sup>(</sup>a) 10 Irish Eq. Reports, 522.

After noticing the formal proof required by the Registry Act, he continues; 'Then the question is, the deed being lost and the possession having gone for a century, according to that deed, whether or not that memorial is secondary evidence of its contents. I confess I should be ashamed of the law of England if such evidence as that could not be received from necessity as secondary evidence.'

In Doe d. Loscombe v. Clifford (a), Alderson, B., rejected the memorial as any secondary evidence. He says 'The memorial is only evidence against the persons who register. I think that if there is no clause in the act of parliament, making the memorial evidence, it is only evidence against the persons registering, and those who claim under them.' See also Wollaston v. Hakewill (b).

In Buller N. P. b 254, it is said, 'When possession has gone along with a deed for many years, (the original being lost or destroyed,) an old copy or abstract may be given in evidence without being proved to be true, because in such a case it may be impossible to give better evidence.'

Lord Redesdale says, in *Bullen* v. *Michel* (c), 'When a record is lost from accidental injuries, an inference is always drawn from the secondary evidence of other circumstances, from which a jury is called upon to presume that of which no direct evidence can be shewn.'

In Taylor on Evidence, Sec. 389, it is said: 'On one or two occasions the memorial or even an examined copy of the registry has been received as secondary evidence of the contents of an indenture, not only as against parties to the deed who have had no part in registering it, but also as against third persons; but in all these cases the evidence has been admitted under special circumstances, as for instance where parties have been acting for a long period in obedience to the provisions of the supposed instrument, or where the deed has been recited or referred to in other documents admissible in the cause.'

I am not aware that our Canadian courts have pronounced any opinion supporting the plaintiff's proposition,

<sup>(</sup>a) 2 C. & K. 452.

or at all at variance from the rule to be deduced from the authorities above referred to.

The solitary fact that fifty years ago a memorial appears duly registered by Gough, the grantee, apparently proved by a witness as referring to a deed, which he swears he saw executed by the grantor, shews to us that Gough then apparently asserted title to these premises. The land is not in any remote situation, but in York township, close to the capital of Upper Canada. Had the evidence shewn that possession was taken within any reasonable time after, and that Gough and his descendants acted as the owners of land in apparent accordance with the title asserted in the Registry Office, and to the knowledge of the grantor, who allowed long years to elapse without objection, the strong presumption might be raised that the title was as the memorial asserts. The conclusion drawn by Pigot, C. B. in Scully v. Scully, would be applicable: 'I think the inference is so cogent as to be almost irresistible that the possession of the land was influenced by a contract corresponding in import with that contained in the articles of which the document purports to be a memorial.'

But when we find the Gough family abstaining for half a century from doing any act to gain possession of valuable land, and late in 1859, for the first time, bringing ejectment on a title said to be acquired in 1807, the inference to my mind at least 'is so cogent as to be almost irresistible,' that the claim is utterly lacking in all those evidences of good faith, and substantial right required by courts of justice in the formal proof of title to landed property.

A long undisturbed possession by the Goughs to the knowledge of the alleged grantors, who thus acquiesced in the long enjoyment of this estate by another, naturally suggests the presumption that such possession is of right. If we found the additional fact that the possessor affected to be the absolute owner, as by conveying to another in fee, &c., &c., it would heighten the presumption.

Our minds are first led to the belief that there was a right for all this, and then we are led on to infer from all

the circumstances that the right was as is set forth in the memorial publicly placed on record with all statutable requirements, as a formal assertion of title by the grantee. We thus are led to believe that the long undisturbed possession and acts of ownership were based on this foundation of right.

Such a conclusion strikes my mind as analogous to that class of cases in which inferences are drawn from the silence of persons who listen without objection or dissent to the assertions of title by another derived from them, and who afterwards permit such other to obtain possession, and use the property so claimed for years without objection.

In this way the facts all combine to make up evidence directly affecting the alleged grantor, and making the presumption convincing that the claim is as the grantee asserts.

My opinion is that the plaintiff wholly failed to make out any case for a jury—that his evidence only proves that his ancestor fifty years ago asserted a claim to this land by his own written declaration and the oath of a witness in the registry office, that he never pursued his alleged right—and that it would he contrary to all authority, and tending to established a most dangerous precedent if such evidence be held sufficient to give title to an estate.

I think the non-suit was right. In the view I have taken, it is unnecessary to notice at length the further strange feature in the case, that the Barrett family seemed to have claimed the land for many years, and that Montgomery states he received a deed from young Barrett, purporting to be from T. B. Gough to his mother, which deed was not produced or accounted for."

The evidence (a) to support a conveyance from a sheriff under execution to one McCrea, was as follows:—Searches for the deed, which the Court held sufficient; proof of the fi.fa. against lands; the receipts thereon endorsed by sheriff

<sup>(</sup>a) Fields v. Livingstone, 17 U. C. C. P. 15.

Memorial signed by grantee held sufficient, notwithstanding errors in it, when corroborated.

6th December, 1823: memorandum attached thereto in the sheriff's handwriting signed by him, "Lot 17, Con. 1, Harwich, sold at sheriff's sale 11th December, 1824, to William McCrea, for £125, sheriff's fees paid by William McCrea:" the Gazette, and publication therein dated 9th December. 1823, reciting a seizure of the land by the sheriff and notice of sale for 11th December then next: a memorial signed by the grantee, produced by the registrar, registered 17th December, 1820, purporting to be of a conveyance by the sheriff dated 16th December, 1830, in consideration of £125 paid him by McCrea, whereby he granted the land to Mc-Crea, and all the interests of the execution debtor therein: it was therein stated that the deed was witnessed by two witnesses, gentlemen, residents of the town of Sandwich This memorial was signed by the grantee, in presence of but one witness. It was also proved that the execution debtor died in 1824, and under an ejectment suit his widow was turned out of possession in 1825 by the deputy sheriff, and possession given to McCrea. The material objections on the question of evidence were, that there was no sufficient secondary evidence, that the memorial signed by one witness only was void as such under the Registry Act, that it bore date 20th December, 1830, was registered 17th December, 1830, and the affidavit of execution appeared to have been made 22nd December, 1830.

The following is part of the language of the Court on giving judgment:

"Are the facts, then, in the present case consistent, and more consistent with the fact of the sheriff having made a deed to McCrea, the purchaser, than with the fact that he did not make one? The sheriff was commanded by process to sell the land. He advertised it for sale, and received £125 from McCrea, and, as appears by the sheriff's memorandum, which is good evidence, because it is an entry in the usual course of business, and against interest, he received this money as the price of this particular lot which McCrea had purchased. It was the sheriff's duty also to have made a deed. Admittedly, however, he did not make it for

several years after the sale. A memorial, or a document professing to be a memorial, was executed in December, 1830, by the grantee, of what is alleged to have been this particular deed, and it was registered at that time. Possession was not taken under this supposed deed until about eighteen years after the making of it, and about twentythree years after the actual sale; but possession has been held for the last eighteen years under this alleged deed, and the defendant now maintains his possession by virtue of it."

The Court held that there was sufficient evidence of the conveyance, but they relied on the other facts beyond the memorial, and it is probable that if they had been wanting the evidence would not have sufficed (a). It is to be remarked that the subscribing witnesses were not called, nor any reason given why they were not.

There would seem to be some danger in allowing mere Danger of allength of possession and dealing with the property to be length of possufficient corroborative evidence whereon to adopt as evi-session, and dence of a conveyance in fee simple absolute a memorial the property executed by a grantee. Take the case of a conveyance to and memorial such grantee for life only; or of a grant to uses to the use of grantee to be some person in fee, but with a shifting use over; or of a deemed suffidevise in fee with an executory devise over on the happen- of a conveying of an event, and a memorial thereof executed by the ance in fee absolute. grantee, referring to an instrument in fee simple absolute. Here, the life tenant, or first taker, might have destroyed the instrument (to the custody of which he is entitled) (b). and have conveyed in fee simple absolute, and the property have passed in fee bond fide through various hands during the life of tenant for life, or before the event whereon the shifting use or executory devise over is to take effect, for fifty years or more, and the possession and dealing with the property have thus been consistent with right of possession, and with the conveyance in fee as set out in the

cient evidence

<sup>(</sup>a) See Wishart v. Cook, 15 Grant, 237, a case between vendor and vendee.

<sup>(</sup>b) See ante, p. 472.

memorial. The reversioner, or other person entitled, or his heirs, are not supposed to enquire till their right accrues, and when it does, they have to contend against evidence offered of the fraudulent memorial and the possession and dealing said to be consistently with it. Again, those entitled on the death of the life tenant, or on the event happening whereon their right accrued, might have been under disability. It might be urged that it may always be assumed that a false memorial as above suggested could not be registered, on the ground that the registrar, as a public officer, would be presumed not to register the instrument if incorrect. It is known, however, that practically, this assumption affords no safeguard, that as a general rule the registrars are quite incapable of placing a construction on an obscure will, or on any but the most common instruments, and are unwilling to incur the risk of declining to register on the ground of a supposed variance. Moreover, until recent Registry Acts, it was not necessary to set out in the memorial the quantity of estate, i. e., the interest, conveyed, and therefore it was held that a memorial varying from the original in that respect, and so registered, was not defectively registered (a). The registrars therefore may not have felt themselves bound to see whether a memorial set out truly in accordance with the instrument matters which the acts did not require to be set out; or to reject the memorial if they found in such matters any variance. The evidence therefore afforded by the mere fact of registry is, it may perhaps be urged, not so strong in regard to those all-important particulars which need not have been set forth as to those which must.

Mere length of possession ficiently corroborative of a memorial signed by grantee that the conveyance was in fee,

The cases when examined hardly go the length of shewseems not suf- ing that mere length of possession though for considerable time, under an alleged grant in fee, coupled with a memorial executed by the grantee, is sufficient evidence against those not claiming under or in privity with the grantee. There are either other facts which lead to the belief of, or are

<sup>(</sup>a) Lessee McDonell v. Murphy, 2 Fox & Smith, 304 in notis; Milv. Hill, 3 H. L. Ca. 828; Wyatt v. Barwell, 19 Ves. 435.

confirmatory of the instrument; or, if mere length of possession alone has been considered sufficient it has been in cases other than on a question of whether the conveyance was in fee simple absolute to the grantee, and where the possession had was quite inconsistent with the instrument being otherwise than as set out in the memorial. been above pointed out that there may have been possession for fifty years or more under a conveyance or will alleged by the grantee or devisee to have been in fee, which possession was quite consistent with a lesser or conditional estate only having in fact passed.

If mere length of possession in those claiming under the if so however, memorial executed by a grantee is to be the only circumpossession stance corroborative of the memorial, as evidence of a con- only should veyance in fee as therein stated, the question at once arises suffice. what length of possession is required. Considering the cases above alluded to of a life estate only being in fact granted, and of limitations by way of shifting use, or by executory devise, and of disabilities, it may be said that the only safe guide would be that length of possession which the courts have established as that from which a title must be shewn to a purchaser, namely, sixty years. The rule is based on grounds applicable to the present ques-The ordinary duration of human life is assumed to be sixty years: taking, therefore, as the root of title a convevance sixty years old, from some one shewn to have been then in possession, but whose title is not otherwise shewn, and conveyances thence in a proper chain of title to the vendor, there is good reason to believe he has good title It is fair to assume the grantor in the first conveyance was of age when he conveyed: taking him to be then only twenty-one, and to have died at the age of sixty, the right of those in remainder or reversion then accrued; twenty years would in ordinary circumstances bar them, and thus the sixty years' possession would confer a title, but only barely so.

It will be observed, however, that after all the safety of the purchaser of the title under these circumstances would

rest more on the Statute of Limitations, than on the presumption that the conveyance is in fee simple absolute.

As between to quiet titles stricter evidence required than in ejectment.

4. As between vendor and purchaser, and under the Act vendor and for Quieting Titles, stricter evidence is required than in under the act ejectment, which is not final in its consequences, and in which the mere temporary right to possession as between only the claimant and the defendant is in issue. It is evident that though the admission of a grantor by a memorial. or otherwise, that he conveyed in fee, should be evidence whereon a claimant in ejectment may establish mere prima facie right to possession, it is quite consistent with such admission that the conveyance is on trust, or subject to be defeated on payment of money, by a shifting use, or the like matters. which in ejectment the claimant is not required to negative, but of which a purchaser must have evidence.

> As between vendor and purchaser, and under the Act for Quieting Titles, the following remarks from Hubback

Conveyancer's evidence.

on Succession, pt. 1, ch. 3, p. 62, apply :- "In weighing the insufficiency of evidence, the practice of conveyancers is more strict; in determining its admissibility, more lax than that of Courts of Justice. The former seems to be an effect of the difference in the position of the parties; the latter, of the difference in the powers and functions of those by whom the evidence is judged. The purchaser in bona fide transactions, by the mere possession of his purchase money, shews and offers to pass an indisputable title to it; whilst the title to land not appearing by possession, he cannot have the same assurance of the vendor's right to the equivalent bargained for. This much seems to be settled; that higher evidence is necessary than such as would merely prevail in ejectment. There are erroneous judgments upon defective or unsound evidence which may be cured by another ejectment; but if the doubts upon a title should after completion ripen into defects, the purchase may find it impossible to regain the position which he held before the contract. What Lord Eldon observed of legitimacy seems to be true of any other matter of fact expression

bigher evilence required than would sustain an viectment.

or impliedly alleged on the abstract; that a jury may collect the fact from circumstances, and yet the Court would not compel a purchaser to take the title merely because The Court will weigh whether there was such verdict. the doubt is so reasonable and fair that the property is left on his hands not marketable. The rule applies generally to presumptions of fact, which conveyancers are slower of raising than Courts of Justice. Thus a seven years' absence without tidings, though it prevails as evidence of death in ejectment, is clearly insufficient as between vendor and purchaser. Besides the greater difficulty of retracting an erroneous step, there exists another cause of difference from forensic practice, the more extensive office of conveyancer's evidence, which is to afford reasonable satisfaction to the purchaser, that the title is good against all the world, and not merely like that of evidence in litigation. that it is sufficient to prevail against certain contending parties. In this particular, a vendor's evidence resembles that of a claimant of peerage; it is not to shew a better or preferable title relatively to any other, but to prove that the title is certainly and exclusively in the party asserting Again, conveyancers' evidence is for the most part necessarily ex parte; a vendor may therefore be required to furnish evidence which would be elicited by adverse proceedings, to prove or disprove facts, which, if he were a party litigant, it would be the business of his opponent to negative or establish. The heir in ejectment, either by or against him, or as a party to a suit in equity, need not adduce proof that his ancestor died intestate, it resting with his adversary to prove the affirmative fact of a will if there is one."

The execution of a memorial which is receivable in evi- Execution of dence need not be proved when more than thirty years old memorial, how proved (a); and it would seem that where a foundation is laid by search or otherwise for the admission of the contents of a memorial as evidence, and when requisite, sufficient corro-

<sup>(</sup>a) Doe Maclem v. Turnbull, 5 Q. B. U. C. 129.

borating circumstances or privity shewn, that such memorial, though not thirty years old, produced from the registry office, need not be proved; and that a copy certified by the registrar as such, is also admissible without proof of execution of the original, or of the instrument to which the original relates (a).

Résult of the

It is difficult to gather any very definite principle from So far as the ordinary principles of evidence apply, it appears difficult to escape from the conclusion of Alderson B., in Loscombe v. Clifford. that "if there is no clause in the Act of Parliament making the memorial evidence, it is only evidence against the persons registering and those who claim under them;" and indeed this seems to be assumed as the rule in Taylor on Evidence, sec. 389. (before quoted,) where the author observes "That in all cases where the evidence has been admitted against third persons, it has been under some special circumstances"; (drawing no distinction between such memorials as have been executed by the grantor and those which have been executed by the grantee). Perhaps, however, this may not be the rule when the memorial is executed by the grantor. and is in reality against his interest, and not as in the case of Jones v. Todd, where the grantor was in fact getting rid of a damnosa hæreditas, and when the memorial was sought to be used against the grantee: though in strictness to render the evidence admissible on this ground, it would of course be essential that the grantor should be proved to be dead at the time the evidence is tendered. memorial is executed by the grantee it seem admitted on all hands. (and the same rule must apply, where though executed by the grantor, it is not in reality against his interest) that it is not necessarily, or in all cases, secondary evidence. And here the distinction must be borne in mind between the admissibility and the weight of the evidence. It seems in the cases in which such evidence has been admitted.

Distinction between the admissibility and the weight of the evidence.

<sup>(</sup>a) Marvin v. Hales, 6 U. C. C. P. 211; Lynch v. O'Hara, 6 U. C. C. P. 267; Buller N. P 255; see also Doe d. Prince v. Girty, 9 U. C. Q. B. 41; Con. Stat. Can. ch. 80; 31 Vic. ch. 20, ss. 21, 51.

the memorials have been rather treated as part of a chain of circumstances given in evidence towards proof of the alleged deed, than as secondary evidence in themselves; and the decisions in effect appear to be, that from the existence of such a memorial coupled with the other proof, the existence of such a deed may be presumed; in other words, that there may be circumstantial secondary evidence, and that such a memorial may form a link.

The remarks of Lord Eldon in Scully v. Scully, are in accordance with this view-" The question, he observes, in every case of this sort is, whether all the testimony taken together, offered as secondary evidence, is or is not sufficient to enable you to say, that as you have not the writing before you, you will act upon it as if you had it before you. and with an absolute certainty of what that writing con-And the observations of Lord St. Leonards in Saddlier v. Briggs, point in the same direction. be observed that most of the English cases in which the memorials have been admitted, have been cases in Equity. in which the Court were judges, both of law and fact, of the admissibility and weight of the evidence (a). Viewed in this light, the effect of a memorial, and the attendant circumstances, become a question rather of fact than of law, and its probative effect in each case will depend, to use the words of Lord Eldon, upon whether upon all facts taken together the Court, or the jury under the direction of the Court, can say they will act upon the alleged writing as if they had it before them. And this would seem not only to be the only way of reconciling the cases, but the only logical way in which such a memorial can be held to have any probative effect whatever. It is certainly not very logical to say, that the question, whether a memorial is in itself secondary evidence, should depend upon whether from other circumstances, it appears probable that the result of such evidence is true; while by treating it as merely a link n the chain of circumstances, this apparent difficulty is obviated.

<sup>(</sup>a) See Thompson v. Milliken, 9 Grant, 359 supra.

Bearing in mind the distinction above referred to as regards the evidence requisite in ejectment, and between vendor and purchaser, or under the Act for Quieting Titles, and that in the two latter cases negative evidence beyond the memorial is requisite to displace possible existence of matters which is not set forth in it, and of which therefore it affords no evidence, the result on the whole appears to be—

1st. That a memorial executed by either grantor or grantee is undoubtedly, secondary, if not primary evidence, against all persons claiming under the person executing.

2nd. That when executed by the grantor, in possession, actual or constructive, and really against his interest, it is probably evidence against third persons.

3rd. That if executed by the grantor, when not in possision, or by the grantee, and not against the interest of the party executing, it is not in itself secondary evidence, but may with other circumstances form a link in the chain of circumstantial evidence, proving as secondary evidence, the existence of a deed.

# APPENDIX.

### FINLAYSON V. MILLS.

[11 Grant, p. 218.]

Merger.

The bill in this cause was filed by Hugh Finlayson, J. McQuaig, and Isaac Buchanan, against Samuel Mills, J. Buchan, William Freeland and Alexander Spottiswoode, setting forth that in June, 1856, Spottiswoode agreed to sell certain lands in the township of Blenheim, to Currie, Buchan, and Freeland, and for £2,500, part of the purchase money, a mortgage was to be given, but which had not, owing to a dispute as to the terms been executed, although the deed to them had been executed and delivered by Spottiswoode, when on the 2nd July 1857, he assigned all his estate to the plaintiffs, for the benefit of his creditors; that Mills claimed to be a creditor of Spottiswoode, to the amount of £1,130, as being a balance due him on the dissolution of a partnership which had at one time existed between him and Spottiswoode, and which had been dissolved in August, 1856, and to secure which Spottiswoode executed an instrument in May, 1857, creating a mortgage on part of the premises. to secure payment of the sum so due him: that subsequently and in the year 1859, Mills, without the consent of Spottiswoode or plaintiffs, purchased from Buchan, Freeland and Currie, their interest in the property conveyed to them, and agreed to assume their position, as to the contract with Spottiswoode, and indemnify them against the unpaid purchase money. The plaintiffs submitted that under the circumstances they, as assignees of Spottiswoode, had a first lien on the property for the unpaid purchase money, to the extent of the difference between the £2,500, due by Buchan, Freeland, and Currie, in respect of their purchase, and the £1,130 due to Mills, and the bill prayed relief accordingly.

The defendant Mills answered the bill, setting up that it had been with the consent of the trustees that he had effected the purchase, the intention being that he should hold the land freed of the vendor's lien, in discharge of the sum so due him by Spottiswoode, the lands having become so depreciated in value as not to be worth that amount.

SPRAGGE, V. C.—The facts, so far as they are material to the case, are shortly these.

The defendant Spottiswoode, in June, 1856, conveyed with other lands the north halves of lots 19 and 20, in the 6th concession Blenheim, to Currie, Buchan, and Freeland, a portion of the purchase money was paid, and a large sum, a little under or over £2,000, remained unpaid. The

plaintiffs allege that a mortgage was to have been given to secure this balance, but this is not proved, and no mortgage was given. Spottiswoode was a vendor, having a lien for unpaid purchase money.

In February, 1857, Currie assigned to his co-purchasers his interest in the purchased property. In May of the same year, Spottiswoode, being indebted to the defendant Mills in the sum of £1.130, assigned to him all his right, title, interest and property, in the north halves of lots 19 and 20 to secure that sum. The sale to Currie, Buchan, and Freeland, and the fact of a portion of the purchase money remaining unpaid, are recited in the assignment. In July of the same year, Spottiswoode assigned all his real and personal estate to the plaintiffs, for the benefit of his creditors.

The position of the parties, so far, appears to be this: Spottiswoode assigns his vendor's lien first to Mills, to secure his debt to him for a less amount than the unpaid purchase money, and then assigns generally to the plaintiffs, which carried to the plaintiffs the right to receive the balance of the unpaid purchase money. The next material fact is, that Mills purchased from Buchan and Freeland the land itself, whether the halves of 19 and 20, or the whole of the land sold by Spottiswoode, does not seem to me to be material. He had previously commenced a suit in this court against Buchan, and Freeland and Spottiswoode, and the plaintiffs in this suit; and that suit was compromised by the conveyance of the land by Buchan and Freeland to Mills-no money passed upon this sale. Mills in his answer says, that the lands had so fallen in value that they were not worth the amount of his debt against Spottiswoode: that Buchan, Freeland, and Spottiswoode were all insolvent, and that the plaintiffs, as he is informed by his solicitor, had notice of the proposed compromise, and acquiesced therein. The consideration is not Mills, and Buchan, and Freeland differ as to more definitely stated. whether Mills was to indemnify them against the claim of the assignees of Spottiswoode for the balance of purchase money, beyond the amount due to Mills himself: but however that may be. Mills became and is the owner of the land upon which the vendor's lien existed; and this bill is filed to enforce that lien. Mills claims to be a mortgagee, within the statute 14 and 15 Vic. ch. 45. He claims that he is first mortgagee, and that plaintiffs are assignees of a second mortgagee, or of one who stands in that position, and that his acquiring what, for this purpose, we must call the equity of redemption, does not postpone him.

I am of opinion that Mills does not come within the protection of the statute. To make it apply, there must be two mortgages, each forming a charge upon the same property. If Spottiswoode were a mortgages, there would be two mortgages in one sense, a mortgage to him and a mortgage by him to Mills, but they would not be two mortgages within the act. Mills would not be a prior mortgage, but a derivative mortgage; and there would be only one mortgage, in the sense in which the

act treats of mortgages; and an assignment of that one mortgage. All that can be said is, that the assignment gave the assignee a right to receive a portion of the mortgage money, in priority to the right of the mortgagee to receive any portion of it. Whether the provisions of the act might properly have been made to apply to such a case it is not for me to say, but I cannot so read the act as to apply them to it.

But in fact, there is in this case no mortgage at all within the meaning of the act, but an assignment of an equity, and Mills was not a mortgage of freehold or leasehold property within the act. The title in the Consolidated Statutes, "An act respecting mortgages of real estate," and the whole tenor of the act, shew this. I incline to think that the proper conclusion as to the purchase is, that the consideration was the unpaid purchase money, and if so, the case is clear. The whole was due to Spottiswoode; he pledged a portion of it to Mills; Mills has the land and cannot claim to retain out of the purchase money more than the portion of it due to himself; as to the difference, unless he accounts for it to the vendor, he has both the land, and so much of the purchase money.

Apart from the act, the plaintiff's case, as against Mills, is that they, the plaintiff's, have a vendor's lien upon certain real estate of which Mills became the owner with notice of the vendor's lien; and whatever may have been the consideration, as between Mills and the original purchasers, the plaintiffs cannot be affected thereby unless assenting parties to some arrangement whereby their lien should be extinguished. There is no evidence of this; all that there is in the way of evidence is that one of the plaintiffs, as trustee of Spottiswoode, approved of the proposed compromise of the suit, a suit to which he with his co-assignees were parties.

VANKOUGHNET, C.—The words in the deed of the first of March 1859, reciting that the conveyance to Mills was in satisfaction of his debt, and he last written words, dispose of the question of intention, even if that twere to govern to the full extent contended for by Mr. Blake. These words leave no doubt as to the contract of the parties, from which the intention must be gathered.

I agree with my brother Spragge in his judgment, that the statute relating to the purchase of equities of redemption does not apply to this case.

[For the application and comprehension of much of the law in portions of the following judgment of Mowat, V. C., the facts of the case will perhaps be less complex by regarding them according to what Spragge, V. C., in his judgment states to be the contention of the defendant Mills. For this purpose Mills may be regarded as first mortgagee, the plaintiffs as second mortgagees, and Mills may be considered as having purchased the equity of redemption of Currie, Buchan, and Freeland, the mortgagors, since a vendor's lien operates as an equitable quasi-mortgage.—
ED.]

Mowat, V. C.—Some question was raised as to whether, according to the bill, the legal estate in the property in question passed to Currie, Buchan, and Freeland. But however this may be, there is no doubt that these persons, from the time of their purchase from Spottiswoode until they transferred their interest to Mills, were at all events, equitable owners of the property; that Spottiswoode had a lien or charge upon it for the unpaid purchase money; that the effect of his mortgage to Mills was to give Mills a first charge for his debt, and to make Spottiswoode's claim for the balance a second charge; that Mills, having thus the first charge, took from Currie & Co., the owners of the estate, in equity if not at law, a release of their equity of redemption; and that, by means either of the mortgage from Spottiswoode or of the deed from Currie & Co. Mills obtained the legal estate.

Prima facie, according to English law, the effect of these dealings of Mills undoubtedly was to merge his charge in the estate, and to leave the balance due Spottiswoode the only incumbrance on the property, as the decree pronounced it to be. Lord St. Leonards, in Garnett v. Armstrong (a) states the English rule thus: "The cases establish that if you, with a prior incumbrance, buy the estate which is subject to a subsequent incumbrance, you let in the second incumbrance to the injury of your first incumbrance; that in fact you lose your incumbrance."

Counsel for Mills did not dispute this general rule, but they contended that the doctrine of merger, as so laid down, depends on intention; that Mills had no intention to merge his debt when he agreed for or accepted the release of Currie & Co.'s equity; and that, at all events, the Act respecting mortgages (22 Vic. ch. 87), protects and keeps alive the charge of Mills, notwithstanding his purchase.

We were referred to Mayhew on Merger, 119 et seq.; Tudor's Leading Cases, 845 et seq.; and Fisher on Mortgages, 312 et seq., for the cases which establish that it is the intention of the party taking the equity of redemption that governs; and this certainly is so, where the party becomes owner of the estate by inheritance or devise. In that case it is for such party alone to determine whether he will keep alive the charge, or will allow it to merge; no one can claim a right to interfere with his wish. The question generally arises between his real and personal representatives after his death; for if there is no merger, his personal representatives are entitled to the debt; and if it merges, the heir takes the estate free from the debt. In such a controversy, if it appears that the party expressed an intention as to the merging, or keeping alive of the charge, effect is given to such intention. If there is no express evidence of intention either way, an intention gathered from his acts will do. In case his intention does not appear, either by express evidence or by his acts, the merger will not take place if there is any other large incumbrance on the



property: for as in that case it may with some probability be assumed to have been for his interest that the charge should remain on foot, as a protection against the other incumbrance, his intention is assumed to have been in accordance with his probable interest. If the other incumbrance is extremely small, as compared with the value of the property, so that he cannot reasonably be supposed to have had any interest in keeping alive his own charge as a protection against it, the intention to keep it alive is not presumed, and the merger takes place (a). So where there is no evidence of an expressed intention either way, and no other incumbrance on the property, and it is therefore a matter of indifference to the owner whether the charge subsists or not, a merger takes place.

But where the owner of a charge becomes the owner of the estate, not by devise or inheritance, but by bargain and purchase, the case is somewhat different. Here it may not be the wish, or expressed intention, or interest, of such owner alone, that is material; the interest of the debtor, whose estate he has acquired, is material also. But no doubt, if the contract between them contains an express stipulation, or manifests a clear intention by both parties, that the charge should be kept alive, notwithstanding the purchase, this may be done. Whatever doubt on this point existed formerly, none exists now (b). In Cooper v. Cartwright (c) Sir W. Page Wood laid it down as now clear that, "in the ordinary case of a sale of a mortgaged estate, if the mortgagee and the mortgagor concurred in desiring to have the mortgage kept on foot, they would be entitled to have the contract for purchase performed in the way they wished." Accordingly the learned Vice-Chancellor proceeded to shew that the terms of the contract shewed conclusively that the mortgage in question was to be kept alive, and added: "Therefore the case is precisely the same as if the plaintiff [the vendee] and Cartwright [the original mortgagor] had both come to the vendors [Cartwright's assignees in bankruptcy] and said that they concurred in desiring that the mortgages should be kept alive. The only possible question that can arise is one of form as to the mode in which the assignees are to be discharged from the mortgage debts."

No doubt also as the law now stands, if the contract contains no express stipulation on the subject, the vendee has a right, as against the vendor, while the contract remains in fieri, to have it carried out in such a form that a merger may be avoided, provided he takes care that the vendor is effectually discharged from the debt; for to use again the language of Sir W. Page Wood in the case already quoted: "It is a matter of pure indifference to the vendor whether his debt is actually discharged, or whether he is personally discharged from all personal hability with respect to it," and the question is merely one of "con-

<sup>(</sup>a) Richards v. Richards, Johns, 754.

<sup>(</sup>b) Bailey v. Richardson. 9 H. 784; Watts v. Symes, 1 DeG. McN. & G. 240.

<sup>(</sup>e) Johnson, 686.

venience to the purchaser, not involving any matter of substance affecting the vendor," who is not permitted "to raise objections to the form of the conveyance."

In the present case, the defendant Mills does not allege in his answer that there was any contract on this point either way; and the only evidence about it is that of his own attorney, who says no more than that it was no part of the agreement that Mills should pay off Spottiswoode. But neither was it, so far as we are informed, a part of the agreement that Mills should not pay him off: or that Spottiswoode should be paid by Currie & Co.; or that they should obtain a release from Spottiswoode or his assignees; or that Spottiswoode or his assignees should give such a release. In the absence of any agreement on the subject, the legal implication is that Mills, as the purchaser of the equity of redemption, should pay Spottiswoode's claim (a). The omission to make any express stipulation may have been from a knowledge of this legal implication, and in reliance on it; or it may have been in ignorance of it, and from want of thought; but as to this there is no evidence, nor do I say that in this case such evidence would be material.

But though there was no express agreement, can the intention, and therefore an agreement, be made out by implication from the form of the instruments by which the bargain was carried out? There were but two documents: the deed of release from Currie & Co. to Mills, and a bond of indemnity from Mills to Currie individually against Spottiswoode's claim. Buchan and Freeland say, that they too, were to have had a bond of indemnity; but this is denied by Mills, and there is no evidence These instruments do not appear to have been hastily prepared or executed. The deed of release alone has been produced. It was drawn by Mill's solicitor, and was sent to Mr. Freeland, the solicitor for Buchan and Freeland. Mr. Freeland added a description of some other lands, and got the deeds executed by his clients and Currie. Mill's solicitor received the deed (executed) on the 12th of April, 1859, subject to the costs Mills had agreed to pay. It was subsequently accepted by Mills. after a conversation with his solicitor about the addititional description which Mr. Freeland had introduced; and was registered by Mills on the 5th of November. This deed is expressed to be made, "in consideration of the settlement of a suit" of foreclosure "between the present parties" to the deed, "and others, and in satisfaction of a certain lien or claim of £1,130 and interest, which Mills had on the property;" and the release is declared to be subject, as to all the lands described in it, to the lien and interest of Alexander Spottiswoode therein. In view of all this language, I think that the deed, instead of affording evidence of an intention to maintain the charge, contains the clearest intimation of an ptention to destroy it; for what Mills has to make out is in effect, that

the release was not to be a satisfaction of the debt, and that Mills was to take, not subject to Spottiswoode's interest, but free from it.

The parol evidence contains nothing that forbids the conclusion which is to be drawn from the deed. On the contrary, Mr. Mill's solicitor expressly states in his evidence, that "it was part of the agreement that Buchan and Freeland were not afterwards to be liable to Mills."

The same witness informs us it was part of the agreement, "that in order to induce Currie to join in the conveyance, Mills should execute to him a bond to indemnify him against any claim that the assignees of Spottiswoode might make against him." It is not alleged that Buchan and Freeland were to indemnify Mills against this liability, and the effect of the bond would therefore be that Currie might at any time afterwards compel Mills to pay Spottiswoode or his assignees, in order to free Currie from his liability: Ranelagh v. Hayes (a), Lee v. Rook (b), Pember v. Mathers (c); or Currie might, if he chose, pay the whole debt himself, and sue Mills for it on his bond of indemnity.

Under all these circumstances, I do not see how it is possible for a court to hold that Spottiswoode's debt to Mills still subsists, and that the plaintiffs must pay it or lose their own share of the purchase money.

The argument from the Consolidated Statute respecting mortgages (22 Victoria, ch. 87) remains to be considered. It is urged that this statute entitles Mills to insist on his debt nowithstanding his purchase. But I cannot so read the act. I cannot suppose that the act was intended to put it out of the power of parties to give priority to a subsequent incumbance. The object of the legislature rather was, I apprehend, to prevent a merger of the debt by the operation of any technical rule where such a result would contravene the intention of the parties, and not to prevent a merger where a merger is necessary to give effect to the intention of the parties. At the time of the passing of the act, the provisions of which now form this chapter of the Consolidated Statutes. some legislative enactment for this purpose was, no doubt, supposed to be necessary. In Toulmin v. Steere (d), Sir William Grant had cited two cases, which he said were "direct authorities to shew that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently, a mortgage which he has got in, against subsequent incumbrances of which he had notice." Mr. Fisher, in his book on Mortgages, page 445, understands this case as having laid down "that the purchaser of an equity of redemption cannot keep up a charge for his own benefit." So Mr. Mayhew in his book on Merger (1861), after stating that "a purchaser of an equity of redemption may now, by paying off the first mortgage out of the purchase money, and shewing an intention to do so, stand in the mortgagee's place against the next

<sup>(</sup>a) 1 Vern. 189.

<sup>(</sup>b) Morseley, 818.

<sup>(</sup>c) 1 B. C. C. 58.

ancer," adds: "The case of Toulmin v. Steere was considered ancer, against this position, (6). Yet, before the persege of our onlmin A. Steele pay peen simost miletaly recognized as su form outs in equity; and in this court two cases had occurred, in the 1850, which were decided on the doctrine of merger (b); and the t had in both cases found it necessary to give effect to the doctrine عَلَةٍ وَلَا

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The Act in question was passed soon afterwards (August, 1851), and ovides, by the lst section, that a purchase of the equity of redemption bythes, by the 18t section, that a purchase of the equity of redemption ay be made by a mortgagee without merging his debt; and by the 2nd. ay ue made uy a mortgagee without merging me deut; and uy the zed action, that in such case a subsequent mortgages cannot forectors or sent without redeeming or selling, subject to the rights of the prior mort. without redeeming or sening, subject to the rights or the prior more gages." Any doubt as to the validity or effect of such a transaction in

The course of judicial decision appears to have done the same thing, or nearly the same thing, in England, since the passing of our statute. this country was therefore removed. or nearly the same thing, in angusho, since the passing of our scatter.

It was in December, 1851, that Watts v. Symes (c) was decided. that case Lord Justice Knight Bruce, after quoting Sir William Grant's tust case Lord Justice Anight Bruce, after quoting our with the greatest deference to the language, in Toulmin v. Steere said: "With the greatest deference to the language, in Toulmin v. Steere said:

"With the greatest determines to the authority of that eminent Judge, I always doubted, and still doubt, whether the cases mentioned by him go that length."

The notice that which Sir William Grant gave the purchaser had of the incumbrance, to which Sir William Grant gave the parchaser and of the incumorance, to which our william trant gave priority, was constructive notice only; and the prior mortgages joined priority, was constructive nouce only; and the prior mortgages joined in the purchase deed and conveyed the legal estate to the use of the purchasers. On the particular of the particular gages for £300 and £400 respectively, on separate leasehold properties. The mortgagor died, charging both parties with an annuity. tor agreed with Catherine Phillips that she should pay off the two tor agreed with Camerine runtips that are anound pay on the two mortgages, and lend the executors £500 more. She did so, and the mortgagees and executors joined in a new mortgage to her for the £1200. Nothing was done therefore on which an argument could be founded for keeping alive the mortgages beyond what appeared in Toulmin v. for keeping alive the morigages neyond what appeared in Louinin v. Steere; yet it was held, first by V. C. Stuart, and afterwards by the Lord Justices, that there was no merger. Lord Justice Knight Bruce said: "The conveyance may not have been perfect, but there can be no doubt as to the intention of all parties to preserve the priority of the

The law of the court, both under the statute and independently of the statute therefore now is, that a mortgaged may take a release of the equity of redemption without merging his debt; but I think that in this Charges of £300 and £400 (2)." equity of recemption without merking me user; out I think that in the one hand, we have no evidence case Mills has not done so; that on the one hand, we have no evidence

<sup>(</sup>a) See Dart on Vendors, to the same effect, p. 590, 3rd ed.

(b) Emmans v. Crooks, ante vol. i. p. 159; Myers v. Harrison, ante vol. i. p. 449.

(c) 1 DeG MoN & C 940

<sup>(</sup>c) 1 DeG. McN. & G. 240.

(d) 4 DeG. & J. 531.

(d) 4 DeG. & J. 531.

(e) 1 DeG. McN. & G. 240.

(e) Vide also Bailey v. Richardson, 9 Hare, 734 (1852); Cooper v. Cartwright, Johns, 688

<sup>(</sup>e) 1 DeG. McN. & G. 240.

whatever that he was not content to merge his debt in the estate he was acquiring, and that on the other hand, we cannot give the natural and fair effect to the express bargain between the parties, or to the intention which it manifests, without holding that the debt of Mills is extinguished and that the plaintiff's claim is the only charge on the property (a). I think the decree should be affirmed.

# Moore v. The Bank of British North America. 15 Grant, p. 308.

#### Registry law-Constructive notice.

In case of an unregistered interest of a date antecedent to the Registry Act of 1865, and not founded upon a deed or conveyance which was capable of registration, constructive notice is sufficient notice against a subsequent registered conveyance; and possession of the property by the party having such unregistered interest is sufficient constructive notice for this purpose.

The Court of Chancery in this country having frequently held constructive notice of an unregistered interest to be insufficient where such unregistered interest was founded on an instrument capable of registration, and the want of actual notice was not wilful or fraudulent, this rule will continue to be acted on, until the different doctrine lately held by V. C. Stuart in England, and Mr. Justice Lynch in Ireland, is adopted in Appeal either in England or here.

This cause was originally heard before the Chancellor, at Brantford, and came on for re-hearing before the two Vice-Chancellors, on the decree pronounced by his Lordship. The facts out of which the case arose are fully stated in the judgment.

The cases cited are with others, mentioned in the judgment of the Court, which was delivered by

Mowar, V. C.—This cause was re-heard before my brother Spragge and myself, in the absence of the Chancellor, before my brother Spragge went to England in 1866, and the incessant pressure of new business since his return has prevented our disposing of the case until now (21st April, 1868).

The plaintiff claims certain land, comprising fifty acres, under a parol contract made by the plaintiff for the purchase thereof from the defendant Thomas Moore. The facts are not disputed. The plaintiff came to this country, with his family, in the fall of 1850, and in September of that year agreed for the purchase of the land in question for \$150, and some work which he was to do for the vendor on the adjoining lot. About half the land was cleared. The plaintiff paid the \$150 by October, 1851. Immediately after the purchase the plaintiff went into possession, and has been in possession and has cultivated the land ever since. By the fall of 1855 he had cleared the greater part of what had been in wood

when he bought; and in 1857 he built a house on the property, in which he and his family have ever since lived. He is described in the evidence as an illiterate man; as being able to read print, but not to read writing; and he is stated not to take a newspaper. The vendor was his brother. The vendor does not appear to have himself got a conveyance of the lot until 25th June, 1855. On the 13th April, 1857, he mortgaged the lot of which the fifty acres in question formed part, to John Haight Cornell and Samuel Palmer Cornell; and they, on the 25th May, 1863, assigned this mortgage to the defendants the Bank of British North America.

The defendants were before this assignees of certain judgments recovered against Thomas Moore; and on the 19th of June, 1860, they filed a bill against him and the mortgagees mentioned, and certain other judgment creditors of Moore, praying for liberty to redeem the prior incumbrances, and for a sale of the land in question, and of other lands of the debtor. Under this bill the Bank became the purchasers; and on the 14th July, 1863, Thomas Moore executed to them a conveyance in pursuance of the sale. Some time afterwards the Bank commenced an action of ejectment against the plaintiff; and on the 14th September, 1865, the plaintiff filed the present bill to restrain the action, and for the specific performance of his contract. The cause came on to be heard before the Chancellor, at Brantford, on the 6th November, 1865, when a decree was made dismissing the plaintiff's bill.

The following is the note made by his lordship of his judgment:—"Whatever opinion I may have individually entertained on this question, I learned from both my brother Judges (a), shortly after entering upon my duties as Chancellor, that it was considered as settled law in this Court, that constructive notice—such as that by possession, &c.—did not avail against a registered title. My brother Spragge still considers that to be the view on which the Court has acted in such a case. This being so, I think I should dismiss the bill with costs, leaving it to the plaintiff to seek for a different declaration of the law either on re-hearing or appeal."

It appears that the impression his lordship thus had at the moment, of what had theretofore been held, was not quite correct. It had theretofore been supposed that constructive notice of an unregistered deed which was capable of registration did not avail against a registered deed; but no such doctrine had been laid down where the unregistered claim was not founded on an instrument capable of registration. On the contrary, in that class of cases, it had been distinctly held in this country as well as in England, that the Registry Act did not apply, and that constructive notice was as effectual as in other cases; and this appears to have been his lordship's own view of what was the correct principle.

There was no express proof that at or before the time of the execution of the mortgage or the deed, the mortgagees or the Bank had actual

<sup>(</sup>a) Esten and Spragge V. CC.

notice of the sale to the plaintiff; but as the plaintiff was in possession of the property, the mortgagees and the Bank, prima facie, took subject to the plaintiff's right. On this point it is only necessary to refer to Holmes v. Penny (a) in Appeal, in which the rule was laid down by the Lord Justice Knight Bruce in these words: "I apprehend that by the law of England, when a man is of right and de facto in the possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property conflicting or inconsistent with the title or alleged title under which he is in possession, or which he has a right to connect with his possession of the property. It is equally a part of the law of the country, as I understand it, that a man who knows, or cannot be heard to deny that he knows, another to be in the possession of certain property, cannot for any civil purpose, as against him at least, be heard to deny having thereby notice of the title, or alleged title, under which, or in respect of which, the former is and claims to be in that possession." The same thing was held by my brother Spragge in Gray v. Cowcher. The consequence of this rule is, that persons dealing for land should ascertain whether the vendor or mortgagor is in possession, and if not, whether the person in possession has or claims any title; and this imposes no unreasonable burden. A purchaser or mortgagee may fairly be expected and required to make some examination of the property he bargains for; and possession being a fact patent to everybody, the danger of its being falsely asserted is greatly less than of actual and express notice of an unregistered claim being falsely alleged.

The Registry Act in force at the time of the plaintiff's purchase was 9th Victoria, chapter 34 (1846), the 6th section of which corresponds with the 44th section of the Act in the Upper Canada Consolidated Statutes (b) and is that on which the contention of the defendants proceeds. By these enactments, as against a subsequent purchaser or mortgagee who has registered a memorial of his deed or conveyance, every prior unregistered "deed or conveyance" was made void: and the settled construction of this enactment in England and in this country is, that it does not affect any equitable right or interest which cannot be registered, but renders void such deeds and conveyances only as are capable of registration. This as Vice-Chancellor Sir W. Page Wood observed in Neve v. Pennell (c), "might indeed, introduce the mischief intended to be remedied in another form; but it was one which the machinery furnished by the Act cannot meet; which is not the case where there exists a document capable of being placed on the register." In this country the mischief is prevented in future cases (d) by the Registry Act of 1865 (e), which provides broadly that no (unregistered) equitable interest shall be

<sup>(</sup>a) 8 D. M. & G. 580.

<sup>(</sup>c) 2 H. & M. 187.

<sup>(</sup>b) Ch. 89 p. 801.

<sup>(</sup>d) Macdonald v. Macdonald, 14 Gr. 133.

<sup>(</sup>e) 29 Vic. ch. 24, sec. 66.

valid "against a registered instrument executed by the same party, his heirs, or assigns."

I have said that the settled construction of the enactment, as it previously stood, was that it did not affect equitable rights which were incapable of registration. Thus, in Sumpter v. Cooper (a) Lord Tenterden, speaking for himself and the rest of the Court of Queen's Bench, used this language: "As to the Statute of Anne (b) we think it cannot be held to apply to the case of an equitable mortgage. It refers only to the registration of deeds; and where there is merely a lien or equitable mortgage created by the deposit of deeds, there is no instrument to be registered;" and when the point is referred to in the English Equity Reports, the only question is, whether the unregistered claim is under an instrument capable of registration (c).

In Ireland, the point does not appear to have been quite so well settled. In Buckley v. Lanauze (d), which was a case of a will, it was distinctly recognized. Lord Plunkett observing: "The Registry Act has no application, inasmuch as under the Irish Registry Act the registry of a will is not provided for, and it is not therefore, a case between a registered and an unregistered title:" and "the ordinary rule of constructive notice is to be applied." In re Driscoll's estate (e), the learned Judge in giving judgment, said: "A considerable portion of the argument before me was on the question, whether an equitable mortgage, by deposit of title deeds on a parol contract, is postponed to a subsequent registered actual mortgage. The first is manifestly incapable of registration; and if such a transaction creates an equitable security, it would seem somewhat hard to hold that, while it is incapable of receiving aid or protection from the Registration Acts, it is liable to be defeated by their operation. To establish the priority of a security created by such deposit over a subsequent mortgage. could scarcely be considered a hardship on a puisne mortgagee who must take his security without obtaining the usual indicia of title. It is not necessary that I should now decide this point, for it does not arise on my previous ruling; but for a time it seemed to me to arise, and during the argument I intimated an opinion rather favorable to the view that the registry of the subsequent mortgage should not give it priority." that case the case in the Court of Queen's Bench (f) and that in the 13th Irish Common Law (g) were cited to the learned Judge; and also a case of Rice v. O'Connor (h), where it had been said that possession under a parol contract partly performed, was not notice as against a registered That view is directly opposed to Holmes v. Penny (i); but title.

<sup>(</sup>a) 2 B. & Ad. 226. (b) 7 Anne, ch. 20, sec. 1.

<sup>(</sup>c) Scrafton v Quincey, 2 Vos. Sr. 413; Wright v. Stanfield, 27 Beav. 8; Moore v. Culverhouse, Ib. 636; Neve v. Pennell, 2 H. & M. 170; Holmes v. Penny, 8 D. M. & G. 572

<sup>(</sup>d) L. & G. t. Plunkett, 341; see also O'Connor v. Stephens, 13 Ir. C. L. 68. (e) Irish Repts. 1 Eq. 288. (f) Sumpter v. Cooper, 2 B. & Ad. 223.

<sup>(</sup>g) O'Connor v. Stephens, 13 Ir. C. L. 63. (h) 11 Ir. Ch. 510; S. C. 12 Ib. 424. (c) S D. M. & G. 572.

neither Holmes v. Penny nor any of the other cases I have referred to was cited to the Court; and the point, in the view taken in appeal of the other facts of the case (a), was not material.

In this Court the authorities are very clear. The very point was decided in McMaster v. Phipps (b). There Chancellor Blake, speaking of the Registry Act then in force, observed: "It settles the priority between conflicting deeds or instruments (if that be the correct construction) which admit of registration, but it does not affect to deal with equitable rights which do not arise upon any deed or written instrument, and as to which therefore, the provisions of the Registry laws are wholly inapplicable. The language and scope of the Act shew that equities of this sort were not in the contemplation of the Legislature; and indeed, as to them, legislative interference was wholly unnecessary, for a purchaser for value without notice was always protected, and I have already shewn that a purchase with notice is not within the Act at all." V. C. Esten said: "I think that equities of this nature are not extinguished by implication—they are certainly not expressly avoided—as against a registered title, by the Registry Act, and that the case of equitable mortgages is only mentioned exempli gratia" (c). This has been assumed to be the law ever since (d). In the Bank of Montreal v. Baker (e), the present Chancellor observed of the document there in question: "If by reason of its being treated merely as a parol instrument it could not be registered, then we are of opinion that the registered judgment could not prevail against it, as in such case the Registry Act as to it could have no application;" and his lordship referred to McMaster v. Phipps, and Sumpter v. Cooper as authorities for this statement of the law.

It was contended for the plaintiff that the question I have been considering was not open to the defendants, as they had not shewn that the title prior to the plaintiff's contract was a registered title. This objection was was not taken at the hearing before the Chancellor, and on the contrary, it appears from the Chancellor's notes, to which we have referred, that the facts were admitted by the plaintiff, and that the effect of them alone was argued. I have therefore assumed that the defendants had a right to raise the point on the re-hearing.

If the plaintiff had claimed under an instrument capable of registration, the case would have been open to some difficulty, as the Court here, before the decision of the Lords Justices in Holmes v. Penny (f), had held that possession was not sufficient notice of such an instrument as against a registered deed (g); and there are decisions of the Irish Courts to the

<sup>(</sup>a) 12 Ir. Ch. 424.

<sup>(</sup>b) 5 Gr. 258.

<sup>(</sup>c) Ib. 261.

<sup>(</sup>d) See Burgess v. Howell, 8 Gr. 37; McQuestien v. Campbell, 8 Gr. 245; Cherry v. Morton, Ib. 407; McCrum v. Crawford, 9 Gr. 340; Robson v. Carpenter, 11 Gr. 293; Harrison v. Armour. Ib. 303.

<sup>(</sup>e) 9 Gr. 299. (f) 8 D. M. & G. 572.

<sup>(</sup>g) Waters v. Shade, 2 Gr. 464; Ferrass v. McDonald, 6 Gr. 310; McCrum v. Crawford 9 Gr. 340.

same effect (a). There are also general observations in the reports of this Court, to the effect that constructive notice of an instrument capable of registration is not sufficient against a registered deed (b)—which has not, in so many words, been held or said in any English case I have seen. though the doctrine, subject to the exceptions I shall mention, seemed implied in or fairly inferrible from the strong language used in some early cases, as to the kind of notice necessary to sustain a claim against a registered deed. Thus, in Hine v. Dodd (c) it was said, that the "proof must be extremely clear;" that "apparent fraud, or clear and undoubted notice, would be a proper ground for relief, but suspicion of noticethough a strong suspicion—is not sufficient," &c. In Jolland v. Stainbridge (d) Lord Alvanley said: "It must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situation of the persons having the prior deed, and knowing that; registered in order to defraud them of that title he knew at the time was in them." In the later case of Wyatt v. Barwell (e), Sir William Grant stated the doctrine of the Court to have been this: "We cannot permit fraud to prevail; and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be effected. . It is only by actual notice, clearly proved, that a registered conveyance can be postponed. Even a lis pendens is not deemed notice for that purpose (f)."

On the other hand, in Sheldon v. Cox (g), which was a case under the Registry law, Lord Nottingham said: "There is no difference between personal and constructive notice, in its consequences, except as to guilt: if there was, it would be very inconvenient and notice would be avoided in every case by employing an agent. The Statute of Queen Anne was intended only to protect purchasers against secret conveyances, but does not prevent their being affected with notice in the same manner as if that Statute had not been made." The reporter has added a query, whether the case was well considered. Again, in Ford v. White (h), the strong language of the earlier cases was thus explained or modified: "I have been referred," said the Master of the Rolls, "to several cases to shew that there should be clear evidence of notice. That is so; but all that is meant is, that the notice proved in this, as in all other cases, must be sufficient to satisfy the Court, and then it must be acted on. If the evidence be doubtful, the Court will either order an enquiry or direct an

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<sup>(</sup>a) In re Burmester, 9 Ir. Ch. 410; Clark v. Armstrong, 10 Ir. Ch. 263; Rice v. O'Connor, 11 Ir. Ch. 510; 12 Ir. Ch. 437.

<sup>(</sup>b) Ferrass v. McDonald, 5 Gr. 312; Baldwin v. Duignan, 6 Gr. at p. 598; Graham v. Chalmers, 9 Gr. 241; McCrum v. Crawford, 9 Gr. 340.

<sup>(</sup>c) 2 Atk. 275. (d) 3 Ves. 485. (c) 19 Ves. 439. (f) See also Wallace v. The Marquis of Donegal, 1 Dr. & Wal. 488; Bushel v. Bushel, 1 Sch. & L., 100. (g) 2 Amb. 626. (h) 16 Beav. 123.

issue to try the fact" (a). It was held in the same case that a person claiming under the Registry law is affected by constructive notice of all that is on the Registry, and of all that what he finds there would put him upon inquiry respecting. The plaintiff was a mortgagee, and the question was as to his right to priority over a mortgage subsequently executed to one Parkes, but registered before the plaintiff's mortgage. This second The Master mortgage was afterwards assigned to one Paget and others. of the Rolls was satisfied that Parkes, at and before he got his mortgage, had actual notice of the plaintiff's mortgage; but there was no evidence that Paget and the others (who claimed under Parkes) were aware of this when they took their assignments. The Master of the Rolls held as follows: "If they relied on the register, I apprehend they must be taken to have notice of the whole register; and if so, they had notice that; two months after the date of Parkes's mortgage, a security was registered, purporting to be dated four years previous. This would put them upon enquiry whether Parkes had notice (b)." I may add that Lord Romilly is one of those Equity Judges who have expressed their regret as to the effect of the decisions which have qualified the Registry Act (c). It was held in Le Neve v. Le Neve (d) followed by other cases (e), that actual notice to a man's solicitor or agent is sufficient as against a registered deed, though there may have been no actual knowledge by the man himself.

These cases are law here as well as in England; but, in the late case of Wormold v. Maitland (f), after a full discussion of the English authorities, it was held by the Vice-Chancellor Sir J. Stuart, broadly, that constructive notice has the same effect as against a registered title as in other cases. In the course of his judgment his Honour observed: "I listened attentively to the defendant's counsel, who argued the case very elaborately, to hear if anything would fall from them to shew (there being no authority for the proposition) that there was anything in the way of principle, or anything which could be suggested, why there should be any difference in their effect between actual notice and constructive notice, and I heard nothing of the kind. No doubt there are cases, from Hine v. Dodd downwards, where the expression 'clear and undoubted notice' has been used; and that expression, it has been argued, means actual as contrasted with constructive-notice. But I should do a very dangerous thing if I countenanced that notion, because constructive notice is notice; and if notice, it is clear and distinct notice, according to the doctrine of this Court." The Irish cases were not cited to the learned Vice-Chancellor, but his decision appears to have been acquiesced in by the parties, and has since been expressly recognized and followed in Re Allen's estate (g). The second of the two classes into which Sir

<sup>(</sup>a) Butsee Foster v. Buell, ante p. 245.

<sup>(</sup>b) See Eyre v. Dolphin, 2 B. & B. 302.

<sup>(</sup>c) 16 Beav. 123.

<sup>(</sup>d) 3 Atk. 466; S. C. Amb. 646.

<sup>(</sup>e) Leuchan v. McCabe. 2 Ir. Eq. 351; Tunstal v. Trapper, 3 Sim. 301; Line v. Jackson, 20 Beav. 639. (f) 35 L. J. Ch. 69. (g) Irish Rep. 1 Eq. 455.

James Wigram divided cases of constructive notice seems to fall within the same principle as cases of actual notice, viz., positive fraud. The class of cases referred to consists of those "in which the Court [is] satisfied, from the evidence before it, that the party charged had designedly abstained from enquiry, for the very purpose of avoiding notice" (a). And there is sometimes great difficulty in drawing the distinction between cases of fraud and mere cases of implied notice (b). In the second report of the Real Property Commissioners (c) it is observed: "Between actual notice and the highest degree of constructive notice there is no substantial difference; indeed the latter, as resting oftener on written evidence, is frequently more clear and satisfactory; and the deference to moral feeling, which affords perhaps the strongest reason for giving effect to actual notice, would be violated in no less degree by denying the same effect to a strong and clear case of constructive notice."

The characteristics of the second class of cases described by Sir James Wigram were probably not in the contemplation of the learned Judges of this Court when saying that constructive notice would not prevail against a registered deed; but to most cases of constructive notice, not falling within that class, or within the principle of Le Neve v. Le Neve or Ford v. White, the doctrine so often stated from this place as to the insufficiency of such notice against a registered title must, in regard to rights in existence before the passing of the Registry Act of 1865, be held to continue to be the law of this Court, until either a contrary rule is asserted by the Court of Error and Appeal, or at all events, until the broad doctrine laid down by Sir James Stuart receives the express sanction of a higher Court in England. The doctrine however, as I have already pointed out, has no application to the case of an unregistered title which is not founded on a deed or conveyance within the meaning of the Act.

The defendants also set up the plaintiff's delay as a bar to relief. But delay while the vendee is in possession is no defence to a bill for specific performance (d); and here the purchase money was duly paid, and all that remains unsatisfied—is some work which the plaintiff was to do in clearing the adjoining lot, for which no time was fixed, and with respect to which, it does not appear that the vendor ever made a demand that the plaintiff did not comply with. These circumstances constitute an additional answer to the defence of delay.

The learned counsel for the defendants contended further, that the plaintiff had acquiesced in his vendor's subsequent dealings with the property. No such defence is set up in the answer, or therefore, is open to the defendants now. But there is no evidence whatever of acquiescence.

<sup>(</sup>a) Jones v. Smith, 1 Hare 55. See Sug. V. & P. 14 ed. pp. 783, 784.

<sup>(</sup>b) Benham v. Keane, 1 J. & H. 702. (c) 1830, p. 38.

<sup>(</sup>d) Sharp v. Milligan, 22 Beav. 606; Clark v. Moore, 1 J. & La. T. 723; Burk v. Smyth, 8 lb. 193; Crofton v. Ormsby, 2 Sch. & Lef. 604; Ridgway v. Horten, 6 H. L. 292.

The plaintiff knew nothing of the mortgage until until some time after it was given, when he was told of it by a friend; and he knew nothing of the Chancery sale until after it had taken place. He had heard of the suit, but was also assured by Thomas that he would make it all right; and the plaintiff thought his brother would protect him and save the property. It is manifest that these facts do not afford the slightest ground for the argument of there having been an acquiesence within the authorities on that subject.

I think there must be a decree for the specific performance of the contract. Reference to the Master to inquire whether the consideration has been fully paid; and if not, what is due to the plaintiff in respect thereof, and the Master is to charge the plaintiff with the value in money, of any work which the the plaintiff has not performed, and is still liable to perform. Just allowances to all parties. Defendants the Bank to pay the costs of the plaintiff, less the amount (if anything) which the plaintiff is still liable for. Should the balance be in plaintiff's favour, or on payment of the balance if against him, conveyance to be executed.

#### Letter from H. Bellenden Ker, Esq., addressed to the Lord Chancellor.

#### "MY LORD,

In compliance with your Lordship's direction, I have, in conjunction with Mr. Hayes and Mr. Christie, revised the act passed in the last session 'for simplifying the Transfer of Property (a).' Though most of the various objects which that act embraces are of a practical and beneficial character, and ought to be included in any comprehensive scheme for ameliorating the law of property, yet the apparent inexpediency of some of its provisions, except, perhaps, as parts of such a scheme, and the confessedly imperfect frame of others, induce us to recommend, as the clearest and safest course, that the act should be wholly repealed, and the clauses of which the policy is unexceptionable be re-enacted in a different form.

We are quite sensible of the difficulty and danger attending any attempt at legislation on detached points of a complicated system, especially where the proposed changes tend to contradict principles on which that system is based; and we have, therefore, approached the subject not without considerable diffidence. The conviction that such partial remedies cannot be too cautiously applied, has induced us to review the act with the intention, first, of confining it to points which may safely admit of being thus separately treated, and, secondly, of legislating upon

those points with greater accuracy and perspicuity. But, although we have prepared the bill now submitted to your Lordship, after the merits and defects of the existing act had been amply discussed by the Profession, it is yet very possible that we may have failed, either to select for omission the objectionable portions only, or to enhance, by alterations in arrangement and expression, the practical value of the rest. The result, indeed, of some recent statutes has shewn that the most elaborate enactments differ from the least accurate only in the degree of help which they require from judicial exposition.

There are two sections of the Transfer Act which it is proposed altogether to omit:—

lst. The ninth section, enabling the executor or administrator of a mortgagee to convey the legal estate outstanding in his real representative.

2ndly. The tenth section, enabling trustees and others to give discharges for moneys.

1st. As regards the ninth section, which provides for the conveyance of a mortgaged estate by the executor or administrator of the mortgagee, the design is good; but it is so imperfectly carried out by the very limited terms of the enactment, that practically the power is attended with very little real advantage. It is necessary, for the purposes of title, to ascertain that possession has not been taken, that no action or suit is pending, and that the legal estate is vested in the real representative of the mortgagee; for a mere negative allegation of these facts in the deed of conveyance would not satisfy a purchaser. But it is obvious that the necessity of proving these facts, and particularly the fact of the legal estate being vested in the real representative, (the very difficulty often being that the heir is unknown), destroys, in a great measure, the utility of the enactment. The clause, besides, authorizes a conveyance only on actual payment to the executor or administrator of the whole debt :--not extending to a conveyance on part payment or a conveyance under any arrangement for exonerating the whole or part of the lands without payment, nor to cases where the money has been paid in the mortgagee's lifetime, or the executor has received the money at a former period, or has assented to a bequest of, or has assigned the debt. And, moreover, as the power-a bare statutory authority-is not conferred on the proving executor alone, it might be considered (though not, we think, on a just view of the provision) necessary to its due execution, that an executor who had not proved, or had even renounced the probate, should join-a possible construction, which would not only narrow still further the range of the power, but probably implicate many titles depending on the con-Another more material objection arises from the trary assumption. want of a precise definition of what shall, for the purposes of the act, be considered as falling within the term 'mortgage,'-a term which, taken



according to its strict legal acceptation, would exclude a large proportion of the transactions comprehended under the popular meaning of that term, and clearly within the mischief sought to be remedied by the clause in question. Such a definition should, therefore, be given as would extend the benefit of the enactment to all cases where, according to the rules of a court of equity, a party is entitled to call for a conveyance of any property, pledged or charged as a security for money, on satisfaction of the debt; whether the security be in the form of a mortgage, to which the right of foreclosure is incident, or of a conveyance to the creditor or his trustee upon trust to sell, or in any other form whatever. Some method, too, more satisfactory than the use of such terms as 'his executor or administratior,' should be devised for ascertaining the person by whom, in every possible state of circumstances, the act is to be performed; for it is only by the expression of a rule of law in general and comprehensive terms, that there can be any reasonable hope of attaining completeness or certainty. Then, as regards the principle involved in this section of the act, if it be fit that a mortgagee's executor or administrator (who, after being paid in full, has no further interest in the matter, and who, as he might, be it observed, have recovered the debt although unable to make or procure a re-conveyance of the estate, may refuse to exercise the statutory power, vested in him as a mere instrument for the convenience of others) should be enabled by his act to denude the heir or devisee of the legal estate and vest it in the mortgagor or his nominee, it must a fortiori be fit that the unpaid executor or administrator should be enabled to command the legal estate for the purposes of the security and the better administration of that portion of the assets of his testator or intestate. It can hardly be contended that the equity of the executor or administrator to have the full benefit of the unsatisfied and forfeited mortgage is not as strong and as urgent, at least, as the equity of the mortgagor to have the full benefit of the redemption. In each case the same principle applies; and that principle, fairly carried out, would require that every person entitled to call for the legal estate should be enabled to obtain it with as little difficulty and expense as may be consistent with safety to the rights of parties, and with the maintenance of the distinction between the jurisdictions of law and equity. In the actual state of the law, there are three modes by which a party equitably entitled may get in the legal estate: -- lst. By obtaining-often at a great expense-often on imperfect evidence, which leaves the title open to question—a conveyance from the party in whom the estate is actually vested, if competent and willing to convey it. 2ndly. In certain cases of incapacity, absence, or refusal, by the still more costly remedy of an order of the Court of Chancery, made on a summary application by petition, pursuant to the acts relating to infant trustees, &c.; but which application involves a reference to the Master, with all its consequences. 3rdly. In cases not within those acts, (which are crippled by many unne-

cessary exceptions), at a still greater expense, by means of a suit in equity regularly instituted. Now all the cases to which the above acts extend fall within the principle of the power in question enabling the executor or administrator of a mortgagee to convey; and that principle once admitted should be adopted to its fullest extent, unless it can be shewn that its general adoption would be productive of inconvenience. But if the general power were so framed as to make its exercise dependant on the fact of the right in equity to call for the legal estate being really in the party who makes the disposition, no undue advantage would be obtained, while the title would be relieved from the necessity which at present exists of proving that the legal estate is vested in the party by whom (or by whose substitute) it is assumed to be conveyed. Having arrived at the conclusion that a free, yet well considered application of the principle already admitted by the Legislature is of the very essence of a wise and just amendment of the law of real property, no attempt has been made to fit the existing clause to the particular case at which it is aimed. If, however, it should be deemed expedient to make a partial application of the principle—to amend the law by engrafting upon it an anomalous provision—the ninth section of the Transfer Act may be so modified as to attain more perfectly the very limited objects of its framers. Though these observations are applied to outstanding legal fees, yet the mischief extends to outstanding terms of years, which, notwithstanding all the remonstrances of the Profession and the practical examples afforded by every railway act of the summary abatement of those nuisances. remain to this day a fertile source of expense, difficulty and delay in the deduction of titles to real estate (a).

2ndly. As regards the tenth section, which enacts that the payment to, and the receipt of, any person to whom any money shall be payable. on any express or implied trust, shall be a discharge, it is conceived that it never could have been in the contemplation of the framers of the act to render in equity the receipt of the person entitled at law under every trust whatsoever (whether merely implied or otherwise) an effectual discharge to the party paying. The effect of this new rule, if carried to its fullest extent, would be to alter essentially one of the most important principles of a court of equity. It is conceived that the rule was intended to remedy an inconvenience of a much narrower extent. In equity the person beneficially entitled is the person to concur in directing the payment to the trustee, except where the cestui que trust is unascertained or incompetent, or where there is some trust shewing that the trustee was to have the money at his disposal for a particular purpose, (as that of re-investment, &c.), or where there is an express declaration absolving the person paying from seeing to the disposition of the money.

<sup>(</sup>a) A remedy has, however, been since attempted by the late act 8 & 9 Vic. c. 112

rules as to the liability of a party paying money to a trustee, without the concurrence of the cestui que trust, to see the money duly applied, . have varied, and are not yet precisely defined. To avoid any question, it has been usual to accompany a trust for sale, &c., with a declaration that the receipt of the trustee shall be a sufficient discharge. This occasionally is omitted, and thence a difficulty may arise, either in ascertaining whether the party paying is or is not bound to see to the ultimate disposition of the money, or in procuring the concurrence of the party entitled, who may be abroad, &c. The evil goes to this extent only; but the remedy is far more extensive, and is one which a very slight consideration will shew the danger of adopting. There can be no question but that it would be desirable to supply a fit remedy, by carefully ascertaining the state of the law as regards any discrepancies or uncertainties, and removing them; and so to extend the rule as to obviate all practical inconvenience. Perhaps a rule which, with some modifications, should give every trustee having an express power to sell or raise money an authority to give a receipt for it, would be advisable. such a rule would be consistent with the 30th Order in Chancery. which renders it unnecessary to make the cestui que trusts parties to a suit where there are trustees competent to sell and give receipts; but if the clause as it stands in the act were to remain, it would of necessity lead to an alteration of the practice; and in all cases where there was a trustee of money, under any trust direct or implied, it would become unnecessary to make the persons interested parties. The remainder of the section refers to the receipts of the survivors of mortgagees being effectual discharges. Similar objections apply to this branch of the clause. Trustees often lend money on mortgage, and take the security to themselves as joint tenants, not noticing the trusts in the deed; but generally there is inserted a declaration that the receipt of the survivor shall be a discharge -thus negativing the equitable tenancy in common. When this declaration is omitted, and a trustee dies, it becomes necessary to shew the trust of the money, and the power of the surviving trustees to give a receipt for it; and this evidence becomes part of the mortgagor's title. It was to remove this inconvenience that the clause was framed; but it goes far beyond the evil in question, by making the receipts of the survivor of all mortgagees who are at law joint tenants sufficient. Now in practice, many persons, not trustees, &c., take securities in joint tenancy; and it would seem very inexpedient thus to repeal generally the salutary equitable rule as regards these securities, and to allow the survivor to possess himself of the whole funds, without the concurrence of the representatives of the other equitable tenant in common. Supposing, however, that this part of the clause is retained, the expression of the rule in the statute being inaccurate, it would requi e considerable alteration.

As these two sections involve great and extended alterations of the law, without supplying any complete or careful expression of the rules, it

has been thought necessary to explain at length the reasons for omitting them from the proposed bill (a).

In the preparation of this bill very little more has been attempted than a re-enactment, in terms more precise and apt, of the clauses of the existing act. If it had not been considered expedient to confine the present bill to a re-enactment of the clauses of that act, except as above stated, and if there had been sufficient time, it is conceived that much advantage might have been derived from enactments which would remove many of the inconveniences arising from the present state of the law relating to the transfer of property. There are many points in addition to those relating to outstanding legal estates already adverted to, as to which enactments might be framed calculated to effect a great diminution of expense in tracing titles. The whole law relating to judgments is very confused and obscure; and the law relating to covenants might be altered with advantage. A reference to the reports of the Real Property Commissioners will fully prove that much yet remains to be done towards simplifying the transfer of, and removing various difficulties relating to the evidence of the title to real property. .

It is now proposed to add some observations on the remaining provisions of the Transfer Act, and some explanation of the views with which the provisions intended to be substituted by the proposed bill have been framed.

As to sect. 2 of the Transfer Act, and also of the proposed bill. An oversight, to which we think undue importance has been attached, has rendered this clause a nullity for practical purposes. A doubt existed whether a lease or bargain and sale for a year, on which a release is founded, is chargeable with progressive stamp duty. The better opinion probably is that the duty is not chargeable, but it had become the general practice to pay the progressive stamp duty. By the Act of the fourth of Victoria, cap. 21, dispensing with a lease for a year, it was provided that the release should be chargeable with the lease-for-a-year stamp duty, (other than the progressive duty), thus giving a kind of legislative sanction to the practice which had obtained. By the second section of the act of last session, a deed, which, without more, was thereby made to operate as a conveyance of the immediate freehold in land, was charged 'with the same stamp duty as would have been chargeable if such conveyance had been made by lease and release.' It was suggested, but we think erroneously, that this enactment required that the progressive duty which would have been chargeable on a lease for a year was chargeable upon the deed deriving its validity from the act; and this having been generally adopted, while there was no measure of the amount of such duty. (which depended on the length of an instrument which did not exist),

<sup>(</sup>a) The "bill" here referred to is now the Act 8 & 9 Vict. c. 106.

it has become the general practice to entirely abandon this clause of the act. and accordingly conveyances to which it would have been applicable are now made under the Lease and Release Act of the fourth of Victoria. This section has been the subject of much criticism and discussion; and it must be admitted that it is not conceived or expressed with that attention to principle and that exactness which ought to characterize an enactment on the subject to which it relates. When it is said that 'any person may convey by any deed, without livery of seisin or incolment, or a prior lease,' it seems to be assumed that there is in law some standard instrument by which, with the addition of any of the above concomitants, the immediate freehold in lands may be conveyed; but there is in fact, no such instrument in law. There are (besides a covenant to stand seised) three several assurances adapted to convey it, viz., feoffment, bargain and sale inrolled, and lease and release, all founded on different principles, differing in their modus operandi, and having an important difference in their effects. If the deed of conveyance established by the Transfer Act be a new statutory assurance, which is neither a feoffment, nor a bargain and sale, nor a lease and release, it is merely nugatory to provide that such assurance shall be effectual 'without livery of seisin, inrolment, or prior lease,' for the forms or solemnities in question have not the slightest significance with reference to such a conveyance; while if, on the other hand, it be considered that the framers did not intend to introduce any new assurance, but only to exempt the existing assurances from useless and troublesome forms, the inattention to principle in the structure of the section is equally apparent; for it is not clear that it would not be necessary to attribute to the assurance the character either of a feoffment without livery, or a bargain and sale without involment, or a release without a lease for a year, and there seem to be no means of ascertaining to which of the three kinds of assurance the conveyance under the act would belong. The only point on which the act can be pronounced clear is, that the assurance, if a bargain and sale. shall operate by transmutation of possession, that is, have the like effect in transferring the legal seisin as a common law assurance would have had, contravening in this respect an established construction of the Statute of Uses, without any other necessity than that which is imposed by the form of the enactment. A further objection is, that it seems to be assumed that livery of seisin has the same reference to a charter of feoffment which enrolment has to a bargain and sale, the fact being that livery of seisin is the essence of a feofiment of which the charter is only the evidence, while the bargain and sale is the assurance to the efficacy of which the form of inrolment was made necessary by a subsequent statute. The general object of sect. 2 of the proposed bill is the same with that of the corresponding section of the Transfer Act; namely, to give to all freehold lands in possession the capacity of being transferred without any of those forms or solemnities which occasion expense and trouble, but have no essential connexion with the act of transfer. A large class of freehold hereditaments is, by the existing law, and has, from the remotest antiquity, been invested with this capacity, to the extent of being transferable by the observance only of those forms or solemnities which are included in the execution of an ordinary deed. The hereditaments so circumstanced are technically said to lie in grant, while the hereditaments to which the law has hitherto denied the capacity of being trans. . ferred by deed are technically said to lie in livery. It has never been proposed that the class of property with which this section deals should be made transferable by any mode less formal than a deed. We have therefore considered that the most direct and the most simple means of obtaining the object proposed is, to impart to corporeal hereditaments. that is, to hereditaments which lie in livery only, the capacity of being transferred by deed, by providing that, 'as regards the conveyance of the immediate freehold thereof,' they 'shall be deemed to lie in grant as well as in livery.' The effect of the clause will be to render a reference to the Lease and Release Act of the 4 & 5 Vic. c. 21, unnecessary in the case of corporeal hereditaments in England, and to dispense with a reference to or recital of a lease for a year in the case of corporeal hereditaments in Ireland.

As to sects. 3 and 4 of the Transfer Act, and sect. 3 of the proposed bill. The third section of the bill consolidates the third and fourth sections of the act, and extends the requirement of a deed to the case of a feoffment. It is apprehended that when the solemnity of a deed was required for the transactions to which these sections apply, the case of a feoffment was not advisedly omitted. An exception is necessarily introduced as to a customary feoffment by an infant. As the cases of such feoffment are local and rare, and the power of making them at all of doubtful expediency, and at variance with the policy of the general law, it did not seem advisable to remove the personal incapacity of the infant so as to enable him to make a deed. The power for an infant of a certain age to make a feoffment exists only under the custom of gavelkind; and should any change be made in the law on this subject, it would perhaps be better to take away the power of making such feoffments, than to attempt improvements in the mode of making them.

As to secs. 6 and 7 of the Transfer Act, and sec. 4 of the proposed bill. The fourth section of the bill consolidates the sixth and seventh sections of the act. The omission from the act of the word 'give' (which has the like effect in implying a warranty or covenant in law, or indeed a surer effect for that purpose than the word 'grant') was probably an oversight. The like observation applies to the omission of 'partition,' which is, to a considerable extent, in the same predicament, with respect to the implication of a warranty or condition in law, as an exchange. The doctrine is not so prominently called into notice in the case of partition as in the case of exchange, because in the great majority of instances,

the undivided share which a co-tenant gives up in one portion of the land is held under the same title with the undivided share which he retains in the portion which he takes in severalty; and thus, in dealing with property taken in severalty on a partition, the investigation of the title to the undivided share given up occasions no additional expense or trouble, being in fact involved in the investigation of the title to the undivided share retained. But though the practical inconvenience of the implied condition is less in the case of partition than in the case of exchange, yet, as the inconvenience is the same in kind, and the principle identical, it would be absurd in a legislative measure to provide for the one case and to omit the other. It is perhaps unnecessary to observe that the seventh section of the act, which declares 'that no assurance shall create any estate by wrong, or have any other effect than the same would have if it were to take effect as a release, surrender, grant, lease, bargain and sale, or covenant to stand seised,' has been understood by some persons to deny effect to an assurance made by way of appointment, and consequently that this construction has occusioned some alarm to parties having powers of appointment equivalent, in point of dominion, to the fee, but having no power of alienation otherwise than by an exercise of their power.

As to sect. 11 of the Transfer Act, and sect. 5 of the proposed bill. The first branch of the eleventh section of the act, declaring 'that it shall not be necessary in any case to have a deed indented,' appears open to the objection of ambiguity; as, first, it may mean that the act or ceremony of indenting need not be performed on the material on which the intended instrument is written, &c., and this meaning is in accordance with the marginal note, but then such note is not part of the act, and cannot be used to construe it; or, secondly, it may be merely descriptive and mean that it shall not be necessary in any case to have an indenture. The terms descriptive of an indenture in the Statute of Incolments (27 Henry 8, c. 16) are, 'a writing indented, sealed, and inrolled in,' &c. It must be borne in mind that the mode of conveyance by bargain and sale inrolled has not been expressly abolished. Now, suppose the true construction of this enactment to be the construction first suggested, and so to render the act of indenting unnecessary, then the bargain and sale will necessarily be a writing sealed and enrolled according to the Statute of Involments, also signed in those cases in which signature has been rendered necessary, but not subjected to the act or ceremony of indenting; on the other hand, suppose the other construction of this enactment to be the correct one, viz., that it shall not be necessary in any case to have an indenture, then this enactment is virtually an abolition of the mode of conveyance by bargain and sale, for the enactment is negative, and the form of a statutable bargain and sale of a freehold interest would be unascertained and unascertainable. The second branch of the eleventh section of the act declares that any person not being a party to any deed ['not party to any deed whatsoever' is the literal expression, though

obviously not the real meaning? may take an immediate benefit under it [there really is not anything to which this pronoun it relates], in the same manner as he might under a deed-poll. The few words interposed and bracketed in the preceding statement indicate some terms and expressions which are very open to critical objection, though not unintelligible. But the real and strong objection to this second branch of the eleventh section is, that it has not been framed with sufficient regard to the qualities of precision and caution. The general rule intended to be thereby varied may be stated thus; viz: 'that a person cannot, under an indenture purporting to be between parties, be immediate grantee or be a covenantee, unless such person be expressly named among the parties.' The defect intended to be cured was the omission to name the immediate grantee or the covenantee among the parties to the indenture, and the most obvious and sure mode was to enact that the deed should operate in regard to him as if he had been named among the parties; but the enactment in question gives the indenture effect by reference to a deed-poll Now the effect of the indenture, supposing that every person intended to be immediate grantee or to be covenantee had been properly named among the parties, either would be the same as the effect of a deed-poll, with respect to the immediate grant or the covenant in question, or else would be different. If the same, then there is a useless circuity of language and thought; but if different in any possible case, then there is error. It is sufficient to mention the subject of estoppel as one in which the effect of an indenture differs from the effect of a deed-poll. We propose by the fifth section of the bill to effect, in a manner which we hope to be both clear and safe, only that which we suppose to have been the real meaning of the eleventh section of the act.

As to sect, 5 of the Transfer Act, and sect. 6 of the proposed bill. The sixth section of the bill differs (besides the difference in form) from the fifth section of the act in the following particulars:-Personal chattels are omitted, because contingent interests in such chattels, being almost invariably equitable, are already assignable in the only way in which, from the nature of the subjects, they are susceptible of assignment. In fact there seems to be no subject upon which an enactment giving a power to assign a legal contingent interest in personal chattels could operate. Had the case been otherwise, we should not have considered it consistent with exact or methodical legislation to mix up a detached point as to personal chattels in an act relating to the transfer of real estates. With respect to married women the existing act makes no distinct provision, and the general enactment, that any person may convey, &c., 'by deed,' could not have been intended to enable married women to convey contingent interests without an observance of the provisions respecting conveyances by married women of the Statute for the Abolition of Fines and Recoveries. We consider that a question might arise whether married women are included under this section, and if

included whether their conveyances would not be effectual without a compliance with the provisions of the above statute. We have therefore directed in express terms that dispositions by married women under the sixth section of the proposed bill should conform to those provisions. As the proposed enactment would not upon any reasonable construction extend to the expectancies of heirs apparent or next of kin, or hoped-for advantages from unexecuted instruments or the wills of living persons. we have abstained from making an express exception of these matters: the addition of the exception would necessarily render obscure the meaning of the positive enactment, while we think that no obscurity will exist unless introduced by this needless addition. We are not sure that we see the object of the provision in the fifth section of the act, that no chose in action shall be assignable at law. Such a qualification is unnecessary in the enactment which we propose to substitute, and indeed would be wholly irrelevant. As the twenty-second section of the Statute (4 & 5 Will. 4, c. 92) for the Abolition of Fines and Recoveries in Ireland has provided, in terms somewhat different, for the conveyance of contingent interests, we have deemed it advisable to confine the sixth section of the proposed bill to England. The terms of the enactment for Ireland have not been pursued, because it appears to be so framed as to enable the original taker of a contingent interest to convey it, but not to confer on his assignee a similar power. It is not, perhaps, clear that the fifth section of the Transfer Act is not open to the same objection.

As to sect. 12 of the Transfer Act, and sect. 9 of the proposed bill. This section of the act is even less perfectly expressed than any of the other sections. The case (one of not unfrequent occurrence) of the merger of the reversion in a particular estate which is itself subsequently merged is omitted. And while the benefit arising from the obligations of the lessee are annexed to the estate for the time being expectant on the lease, notwithstanding the merger of the particular reversion originally expectant thereon, there is no corresponding annexation to the same estate of the obligations of the lessor. These omissions would have rendered the repeal of this particular section necessary, even had no other alteration in the act been required. The language of the section seems to be taken, to a considerable extent, from the act of the 32 Hen. 8. c. 34; but a degree of inaccuracy pervades the whole, for which it is difficult to account. The section begins by speaking of 'a lease;' subsequently the same interest is called 'his lease, demise, or grant,' being the language of the act of Henry VIII. It is provided, that the person entitled to the estate into (in) which a reversion shall merge shall enjoy the like advantage, &c., against the 'lessee, his heirs, successors, executors, administrators and assigns, for non-payment of rent, &c., contained 'in his lease. demise, or grant, against the lessee, farmer, or grantee, his heirs, successors, executors, administrators, and assigns,' the latter words, 'lessee, farmer,' &c., (being again the language of the act of Hen. VIII.)

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relating precisely to the same subject before expressed by the single word 'lessee,' and being moreover a repetition. But the words are not merely a repetition,—a mere surplusage in point of expression,—nor are they as innoxious as two wholly irrelevant lines inserted at random would be; for the omission of the words the 'lessee, his heirs,' &c, would have made the words in italics significant, if not correct, and the omission of the words in italics would also have left the clause comparatively right. But the insertion of both, while one must be rejected before the clause becomes even language, and the expression of each in words wholly differing though manifestly intended to relate to the same subject, and the absence of any guide to shew which is to be rejected, produce a degree of embarrassment which would alone furnish a reasonable excuse for the repeal of this section.

As to sect. 13 of the Transfer Act. It is not clear what the effect would be of the provision that the act should not extend to 'any act or thing executed or done before the 1st of January, one thousand eight hundred and forty-five,' and there is little doubt that these words would be the source of much discussion; but the provision that the act shall not extend to any 'estate, right or interest created before the 1st of January, one thousand eight hundred and forty-five, has already received a practical exposition in the generally adopted opinion, that the act has no application to any estate tail, estate for life, or other particular estate, or to any lease existing at the commencement of the act, or, so far as the power of alienation is concerned, to any contingent or future interest created before that date. This is wholly unreasonable; and an undistinguishing withdrawal from the presumable benefits of the act of a large class of interests which have the first claim to be attended to in any legislative measure. could not have been intended; and even had no other alteration been required, yet in this particular an amendment of the act would have been absolutely necessary.

I have the honour to remain

Your Lordship's obedient servant,

"H. BELLENDEN KER."

"LINCOLN'S INN, 28th April, 1845."

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- PP. 4. 5, 6.—On the covenant against assignment without leave, that assignces in law are not bound though assigns are named, and that their assigns are bound, if assigns are named; see Winter v. Dumerque, 12 J. N. S. 726, Ex. Chamber.
- P. 58.—As to an instrument operating as a lease or as a mere agreement for a lease, see Davidson Convey. vol. 5, p. 6, and cases there cited.
- PP. 9, 72.—That a proviso for re-entry in a lease in case the lessee should be convicted of an offence against the game laws, does not run with the reversion, see Stevens v. Copp, L. B. 4 Ex. 20, but see per Kelly, C. B. As to covenants with a vendor of portions of lands against building thereon running with the land retained in favor of the grantees thereof, Western v. Macdermot, L. B. 1 Eq. 449. See further as to covenants not running with the land at Law, and yet being binding in Equity if notice had of the covenant: Wilson v. Hart, L. B. 1 Cha. App. 463.
- P. 191.—It is conceived that in case of death of a mortgagee, he would not, at Law at least, be so far regarded as a trustee as to prevent the application of the Statute of Victoria, and descent by primogeniture, and that in this respect Equity would follow the Law.
- P. 325.—The present practice of the Court of Chancery, under the Act for Quieting Titles, is to require that the existence of an execution in the Sheriff's hands should be negatived for a period of thirty days before the petition, from which it may be inferred that a delay to redeliver for that period would be an abandonment.
- P. 377.—That a second mortgagee, though his mortgage be on trust to sell, may purchase irredeemably on a sale by a prior mortgagee, see Kirkwood v. Thompson 13 W. R. 495, 1052, 11 Jur. N. S. 385, S. C.
- PP. 401, 402, 403.—That possession is constructive notice; Gray v. Coucher, 15 Grant, 419. That however constructive notice by possession will not prevail against a registered instrument under the Registry Act of 31 Vic., see Sherboneau v. Jeffs, 15 Grant, 574.
- P. 278.—A married woman, who was residuary legates to her separate use under Con. Stat. ch. 73, held bound by her authority to the executors, with her husband's assent, to take land in payment of a debt due the testator; and semble even without the husband's assent; McCargar v. McKinnon, 15 Grant, 361.
- PP. 223, 224.—That a wife having joined with her husband in a mortgage, is not entitled in case of deficiency of assets on his death, to have the estate exonerated as against simple contract creditors to let in dower; White v. Bastedo, 15 Grant, 549, overruling Sheppard v. Sheppard, 14 Grant, 174; see also Thorpe v. Richards, 15 Grant, 408.
- P. 324.—That a purchaser under execution will not be affected by mere want of non-compliance with the Statute as to advertising the sale by the Sheriff &c; Connor v. Douglas, in Appeal, 15 Grant, 456, and cases there referred to.



